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THIRTEENTH REPORT

CONTRACT ACT, 1872

LAW COMMISSION OF INDIA

GOVERNMENT OF INDIA
MINISTRY OF LAW

CHAIRMAN,
LAW COMMISSION,
NEW DELHI,
September 26, 1958.

Shri A. K. Sen,
Minister of Law,
New Delhi.

My dear Minister,

I have great pleasure in forwarding herewith the Thirteenth Report of the Law Commission on the Indian Contract Act.

2. At its first meeting held on the 17th September, 1955, the Commission decided to take up the revision of the Indian Contract Act and entrusted the task to a Committee consisting of Shri G. S. Pathak and Shri G. N. Joshi.

3. The consideration of the subject was initiated by Shri Pathak who formulated a scheme for the revision of the Act. The principles underlying the scheme were discussed at meetings of the Statute Revision Section of the Commission held on the 11th March, the 14th April, the 12th May, and the 10th June, 1956. A draft Report prepared by Shri Pathak in the light of the discussions was circulated to all the Members of the Commission and their views invited thereon. The Report together with the views was discussed at a meeting of the Statute Revision Section held on the 24th August, 1958. Important suggestions made by Members at this meeting were accepted and it was left to the Chairman to finally settle the Report in the light of the discussion.

4. Shri Pathak being outside India is unable to sign the Report personally. But he concurs in the recommendations and has authorised the Chairman to sign the Report on his behalf. Dr. N. C. Sen Gupta and Shri D. Narasa Raju, who are unable to come down to Delhi to sign the Report but similarly concur in the recommendations and have authorised the Chairman to sign the Report on their behalf.

5. The Commission wishes to acknowledge the services rendered by its Joint Secretary, Shri D. Basu, in connection with the preparation of the Report.

Yours sincerely,

M. C. SETALVAD.

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REPORT

OF

THE LAW COMMISSION

ON

THE INDIAN CONTRACT ACT, 1872

PART I

General

Developments in the law since 1872.

1. Since 1872 there have been new developments in the theory of the law of Contract. The common law of England, on which the Indian Contract Act is principally based, had its roots in the real property law, which has been described by Denning, L.J., as being "devoid of moral concepts like mathematics[1]." "Rights and wrongs", says Denning, L.J., "did not enter into it nor the redress of grievances; only words and rules and logical deductions from them. In those early days land was the most important kind of property; and the common law lawyers were so absorbed in the land problem that they approached other problems in the same frame of mind. They looked for certainty, and gave justice a second place. In their hands, the law of Contracts and Torts tended to become as technical and rigid as the law of Property[1]." In the nineteenth century, freedom of contract was the governing principle. As Prof. Keeton[2] points out, the emphasis, today, must be placed upon the problem "whether as a result of unceasing administrative encroachment, freedom of contract will survive at all to any noticeable degree." Modern developments in the law of Contract reflect the aspirations of society in rapid transition.

Scope of revision.

2. We have noted these modern trends and also studied the views advanced by jurists in various countries as well as the changes recommended by the Wright Committee in England and the New York Law Revision Commission in America. Besides, there have been numerous judicial pronouncements on the interpretation of the various sections of our Act. Sometimes conflicting views have been

[1] "The Need for a New Equity" in (1952) Current Legal Problems, 1 (8).

[2] Elementary Principles of Jurisprudence, 408.

expressed and on a few occasions legislative changes have been suggested. We have examined such decisions and sought to resolve the conflict. We have also taken into consideration the suggestions received from members of the Bar and the Bench and the general public. At the same time, our conclusions have all along been influenced by the consideration that it will not be advisable to introduce such radical changes as may unnecessarily upset the concepts which have become deep rooted in the jurisprudence of the country and which now form part of the accepted notions of the lawyer and the layman.

Need for codification of supplementary principles.

3. As its Preamble says, the Act of 1872 does not profess to be a complete Code dealing with the law relating to contracts. The legislature, while enacting this Act, did not intend to exhaustively codify the whole of the law of contract to be applied by the Courts in India[1] or even any particular sub-division thereof. Thus, it has been held[2] that sections 124 and 125 of the Act do not lay down the whole of the law of Indemnity. As a result, on all matters on which it is silent the courts have had to resort to the rules of English Common Law, as principles of 'justice, equity and good conscience[3]'. We are of the opinion that this reliance on the principles of English law to supply the deficiencies of an Indian enactment is not conducive to certainty or simplicity of the law. We think it is preferable to add to the Act the English common law principles which have been applied by our Courts for nearly a century, so that it may not be necessary to refer to the English law in many cases.

The formulation of these principles is thus one of the objects of the revision undertaken by us.

4. Another aspect of revision arises from the fact that the law of Contract in India is not contained in the Indian Contract Act alone and there are a number of statutes dealing with its various branches. Whitley Stokes was of the view that all these should be consolidated and incorporated into the Contract Act[4]. But the legislative trend since the enactment of the Contract Act has been in

[1] *Irrawaddy Flotilla Co.* v. *Bugwandas*, 18 Cal. 621 (P. C.).
[2] *Gajanan* v. *Madan*, A. I. R. 1942 Bom. 302 (303).
[3] S. 37 of the Bengal, Agra and Assam Civil Courts Act 1887 ; S. 16 of the Madras Civil Court Act 1873 ; S. 26 of Bombay Regulation IV of 1829.
[4] Whitley Stokes : Anglo Indian Codes, Vol. I, p. 534.

the other direction. Not only have separate Acts been passed on special aspects of contractual transactions, such as the Negotiable Instruments Act, 1881, but parts of the Contract Act itself have been taken out to constitute independent enactments relating to particular contracts, such as the Sale of Goods Act, 1930, the Partnership Act, 1932. On this point, the observations of the Select Committee on the Partnership Bill are interesting—

> "When Sir James Stephen moved the Indian Contract Bill, he admitted that it was not and could not pretend to be, a complete code upon the branch of law to which it related. He, however, expressed a hope that in later years it would be easy to enact supplementary chapters relating to the several branches of law of contract which the Bill did not touch. This hope has never been fulfilled. In later years it was found more convenient to have separate enactments for the several branches of the law of contract *e.g.*, the Transfer of Property Act, the Negotiable Instruments Act, and the Merchant Shipping Act. In our opinion, in view of the complexity of modern conditions, the time has now come when this process should be accelerated by embodying the different branches of the law relating to contract in separate self-contained enactment[1]".

We agree with these observations in so far as they suggest that special aspects of the law of contract should be dealt with in separate enactments inasmuch as owing to the expansion of the law it is not possible to include all its branches in one statute without making it unwieldy or cumbrous. It is this consideration which has induced us to recommend in our previous Report on the Sale of Goods Act[2] that the law relating to hire-purchase should be codified in a separate enactment apart from the general law of sale of goods. On the same principle, we are of the opinion that laws relating to carriers should be codified and consolidated into one separate statute. The Contract Act should be left to deal with the general principles relating to contractual relationship.

[1] Gazette of India, dated the 24th January, 1931, Part V, pp. 31, 32.

[2] Eighth Report of the Law Commission on the Sale of Goods Act, 1930, para. 12, page 4.

In this view, we do not see any existing Act which can expediently be consolidated with the Contract Act.

Doctrine of consideration.

5. We have devoted anxious thought to the modern attitude towards the doctrine of consideration and to the desirability of its abolition or, at any rate, modification. This doctrine was borrowed from English Common Law. According to some eminent English jurists, the law on the subject requires change. Professor Holdsworth has described the doctrine "as something of an anachronism[1]", and observed that "the requirements of consideration in its present shape prevent the enforcement of many contracts, which ought to be enforced, if the law really wishes to give effect to the lawful intentions of the parties to them; and it would prevent the enforcement of many others, if the judges had not used their ingenuity to invent considerations. But the invention of considerations, by reasoning which is both devious and technical adds to the difficulties of the doctrine[2]". Thus remedy, according to Prof. Holdsworth, is not to scrap the doctrine of consideration but to reduce it to a subordinate place in the English theory of contract. He suggested, *inter alia,* that the law should provide that all lawful agreements should be valid contracts if the parties intended by their agreement to affect their legal relations, and either consideration was present, or the agreement was put into writing and signed by all the parties thereto.

Lord Wright has remarked that the doctrine of consideration in its present form serves no practical purpose and ought to be abolished[3]. Sir Frederick Pollock has said that the application of the doctrine of consideration 'to various unusual but not unknown cases has been made subtle and obscured by excessive dialectic refinement[4]". Equally strong observations are to be found in judicial pronouncements. In the well-known case of the *Dunlop Pneumatic Tyre Co.*[5], Lord Dunedin observed:

> "I confess that this case is to my mind apt to nip any budding affection which one might have had

[1] Holdswort : History of English Law, Vol. VIII, 47.
[2] *Ibid.*, 46.
[3] The Article "Ought the doctrine of consideration to be abolished from the Common Law" published in (1936) 49 Harvard Law Review, 1225 (1253).
[4] Genius of Common Law, 91.
[5] *Dunlop Pneumatic Tyre Co.* v. *Selfridge and Co.*, (1915) A. C. 847 (855) H. L.

> for the doctrine of consideration. For the effect of that doctrine in the present case is to make it possible for a person to snap his fingers at a bargain deliberately made, a bargain not in itself unfair, and which the person seeking to enforce it has a legitimate interest to enforce."

6. In America too, the doctrine of consideration has received severe criticism at the hands of Dean Pound. He observes:

> "It is significant, although we have been theorising about consideration for four centuries, our texts have not agreed upon a formula of consideration much less our courts upon any consistent scheme of what is consideration and what is not. It means one thing in the law of simple contracts, another in the law of negotiable instruments, another in conveyancing under the Statute of Uses and still another thing no one knows exactly what in many cases in equity[1]."

According to him, promise as a social and economic institution becomes of the first importance in a commercial and industrial society. A man's word should be "as good as his bond" and his fellowmen must be able to rely on the one equally with the other if our economic order is to function efficiently. This is the expression of the moral sentiment of the civilised society[2].

7. The continental countries adopted the requirement of 'causa' (which literally means a 'reasonable cause[3]') from Roman Law. But the interpretation of that expression has given a very wide and elastic meaning to the requirement of an agreement enforceable at law. Thus, as the Privy Council has observed[4], according to Roman-Dutch Law, a promise deliberately made to discharge a moral duty, or to do an act of generosity or benevolence can be enforced at law. In other words, "the doctrine has become so broad that it is almost true to say that any agreement for a lawful object is valid if the parties seriously intend

[1] Pound : An introduction to the Philosophy of Law (Revd. edn.), 155.

[2] *Ibid.*, 147.

[3] Paton, A Text Book of Jurisprudence (2nd Ed.), 354.

[4] *Jayvawickrame* v. *Amar Suriya*, (1918) Ac 869 (875).

to enter into legal relations." Many French writers who support this view have openly discarded the doctrine of causa as confusing[1]. The German Civil Code, similarly makes no mention of causa and under that Code, every lawful agreement entered into with the serious intention of being legally binding would directly produce an obligatory effect.

8. In England, the problem of consideration was referred to the Law Revision Committee, whose sixth report appeared in 1937[2]. The Committee's general conclusion substantially accepted Professor Holdsworth's view, for it advocated that a contract should exist if there was an intention to create legal relations and if either the contract was reduced to writing or consideration was present. It may be noted, however, that the Parliament in England has not yet adopted the recommendation of the Law Revision Committee. In the United States of America, the New York Law Revision Commission which was constituted at about the same time as the English Law Revision Committee, reached conclusions which in many respects were similar to those of the English Committee.

9. Notwithstanding the foregoing considerations and the views of eminent jurists, however, we are unable to recommend an abolition of the doctrine. It has become so firmly rooted in our concept of contract, that a wholesale rejection of the doctrine would have the result of overturning the very structure on which our Law of Contract is based and would require a complete and thorough overhaul of the law. This, in our opinion, is hardly warranted by the circumstances. Nor do we feel it logically defensible to provide, while retaining the existing law, that where a promise is in writing, no consideration should be required. We have, accordingly, come to the conclusion that instead of abolishing the doctrine or introducing an alternative to it, we should make suitable changes in the existing law which will have the effect of preventing the inequitable and anomalous consequences resulting from a rigid adherence to the doctrine. We propose to achieve this end by adding some clauses to section 25 which now enumerates the exceptional cases where a contract without consideration is valid.

[1] Paton, *ibid.*, 355.

[2] Sixth Interim Report of the Law Revision Committee, 1937, Cmd. 5449.

10. Great injustice is done sometimes where a promise is made which the promisor knows will be acted upon and which is in fact acted upon and then it is held that such promise is unenforceable on the ground of want of consideration. A common example of such a case is where a person agrees to pay a subscription to a charitable institution with the knowledge that a building will be constructed with the aid of the amount subscribed and the trustees of the charity incur expenditure on the faith of the fulfilment of the promise. The Law Revision Committee of England has cited a number of such instances and the American Restatement on Contract, under section 60 in the Volume on Contracts, also mentions them. In India, some Judges have upheld such promises on the ground that they were supported by consideration[1] inasmuch as the expenditure was incurred "at the desire of the promisor", while other Judges have held that the facts did not justify the finding that the expenditure was incurred "at the desire of the promisor" and thus the agreement being without consideration was void and unenforceable[2]. In our opinion, the former view puts considerable strain on the meaning of the expression "at the desire of the promisor". "A promise, which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance, is binding, if injustice can be avoided only by enforcement of the promise[3]". In order to set at rest the above-mentioned controversy and to prevent injustice, we recommend that an exception be added to section 25 on lines similar to those suggested in the Sixth Interim Report of the Law Revision Committee in England. According to that Committee, "a promise which the promisor knows or reasonaby should know, will be relied upon by the promisee, shall be enforceable if the promisee has altered his position to his deteriment in relying on his promise[4]". We are further of the view that for purposes of this exception, a promise need not be an express promise but may be implied from conduct *i.e.*, from acts or omissions. The words "express or implied" should therefore be added

[1] *Kedarnath* v. *Gorie Muhammad*, 14 Cal. 745; *Perumal* v. *Sendanatha*, A. I. R. 1918 Mad. 311.

[2] *Doraswamy Iyer* v. *Arunachala*, A. I. R. 1936 Mad. 135.

[3] American Restatement on Contracts, 110 (s. 90).

[4] Sixth Interim Report, para. 50, Recommendation no. 8 (p. 31).

after the word "promise" in adopting the above recommendation of the Law Revision Committee.

11. According to the present law in India, which is the same as in England, an undertaking to keep the offer open for a certain time, is a promise without consideration, and as such unenforceable. In order to be binding, such a promise must be supported by a distinct consideration. This rule is a necessary implication from section 5 and sub-section (2) of section 6 of the Contract Act.

The Law Revision Committee recommended that an agreement to keep an offer open for a definite period of time or until the occurrence of some specific event should be enforceable even where there is no consideration to support it[1].

A similar recommendation has been made by the Law Revision Committee in respect of a promise to dispense with or remit the performance of a promise or to extend the time for its performance.

We recommend that exceptions should be added to section 25 of our Act in terms of the above recommendations of the Law Revision Committee.

12. It was suggested to us that it should be made clear that the performance of a pre-existing legal duty should not form good consideration. In our view no change is called for in this respect, for, the cases where such legal duty arose out of a pre-existing contract between the promisor and promisee are fully provided in section 62, as would appear from the Illustrations thereto; and the cases where it arose out of contract with a third party is governed by the existing provisions. We do not recommend any change in the law on this topic.

The doctrine of privity.

13. Closely connected with the doctrine of consideration is the rule that a third party cannot sue on a contract though made for his benefit.

In English Law the rule came to be established in the 19th century after the crystalization of the doctrine of consideration, the first important landmark being the case of *Twedle* v. *Atkinson*[2] decided in 1861. It has been cate-

[1] *Ibid.*

[2] (1861) I. B. & S. 393.

gorically reaffirmed by the House of Lords in *Dunlop Pneumatic Tyre Co.* v. *Selfridge*[1]. The hardship of the rule, however, manifested itself early, particularly where a person was entitled to some benefit under a contract to which he was not a party. Courts of equity sought to mitigate the hardship by applying the doctrine of constructive trust[2]. But this device necessarily involved a fiction and in a number of cases the device has failed to work as the judges insisted upon a strict application of the fiction[3]. In quite a few cases, such as benefits under insurance policies, the Legislature has intervened to modify the operation of the rule[4].

14. The English Law Revision Committee which examined the rule in its sixth interim report[5], has been unable to support the doctrine as it stands. The Committee thus observed—

> "The common law of England stands alone among modern systems of Law in its rigid adherence to the view that a contract should not confer any rights on a stranger to the contract even though, the sole object may be to benefit him[5]",

and recommended legislation to the following effect—

> "Where a contract by its express terms purports to confer a benefit directly on a third party it shall be enforceable by the third party in his own name subject to any defences that would have been valid between the contracting parties. Unless the contract otherwise provides it may be cancelled by the mutual consent of the contracting parties at any time before the third party has adopted it expressly or by conduct[6]."

The English Legislature has yet to give effect to the recommendation. Meantime Denning L. J. (as he then was) has assailed the rule as to privity of contract as a comparatively recent innovation[7] replacing the more than

[1] (1915) A. C. 847 (853).
[2] Cf. *Grandy* v. *Grandy*, (1885) 30 Ch. D. 57.
[3] Cf. *Vandepitte* v. *P. A. I. Corporation*, (1933) A. C. 70.
[4] E. g., s. 36 (4) of the Road Traffic Act, 1930 (20 & 21 Geo. 5, c.43); s. 56 (1) of the Law of Property Act, 1925 (15 & 16 Geo. 5, c. 20).
[5] Sixth Interim Report, para. 41.
[6] *Ibid.*, para. 48.
[7] In *Drive Yourself Hire Co.* v. *Strutt*, (1954) 1 Q. B. 250, p. 272.

two centuries old settled law to the contrary. Though Denning L. J's reading of the history of this doctrine has not passed without criticism[1], even his critics seem to be in agreement with him as to the need for giving effect to the recommendations of the Law Revision Committee.

15. There has been a conflict of judicial opinion as to the applicability of this doctrine in India.

(a) In some cases[2] the view has been taken that the words 'any other person' in s. 2(d) which depart from the English rule that consideration must proceed from the promisee neccesarily implied a corresponding deviation from the English rule as to privity of contract.

(b) The preponderating view, however, is that the English rule of privity of contract applies to India[3], notwithstanding s.2(d). The rule was applied by the Privy Council in *Jamnadas* v. *Ram Autar*[4]. In *Krishna Lal* v. *Promila*[3], Rankin C. J. struck a decisive blow to the argument based on the language of s.2(d). While conceding that the clause might be construed as implying a departure from the corresponding English rule, he observed that the definitions of promisor and promisee in section 2 rigidly excluded the notion that a stranger to a contract can sue thereon.

(c) At the same time, following English Law, a number of exceptions have been engrafted upon the doctrine by our courts. Thus, it has been held that a person who is not a party to a contract may nevertheless sue upon it—

(a) Where the contract implies a trust in favour of the third party[5], whether any property is specifically charged or not[6].

(b) Where money to be paid under the contract is charged on some immovable property[7].

[1] *Vide* E. J. P. : Privity of Contract, 70 Law Quarterly Review, p. 467.
[2] *Kindersley* J. in *Chinnayya* v. *Ramayya*, 4 Mad. 137 ; *Kshirodbehari* v. *Mangobinda*, 61 Cal. 841 (860).
[3] *Krishna Lal* v. *Promila*, A. I. R. 1928 Cal. 518 ; *Subbu Chetti* v. *Annachalam*, A. I. R. 1930 Mad. 382 (F. B.) ; *National Petroleum Co.* v. *Popatlal*, 60 Bom. 954.
[4] I. L. R. (1912) 34 All. 63 P. C.
[5] *Khawaja Md.* v. *Hussaini Begum*, (1910) 32 All. 410 (P. C.) : *Mukherjea* v. *Kiran*, (1938) 42 C.W.N. 1212.
[6] *Dan Kuer* v. *Sarla*, A. I. R. 1947 P. C. 8.
[7] *Adhar* v. *Dol Gobinda*, (1935) 40 C. W. N. 1037 ; *Atikalla* v. *Mobarak*, A. I. R. 1949 Cal. 174 ; *Gulabchand* v. *Laxminarayan*, A.I.R. 1944 Nag.46

Several exceptions have also been introduced by s.23 of the specific Relief Act, 1887, *e.g.*, in favour of the beneficiaries under a marriage settlement or compromise of doubtful rights.

16. That a rigid adherence to the doctrine of privity is bound to cause hardship is obvious. The present state of law in India is not quite certain and the particular exceptions which have been acknowledged by case-law and statutes do not cover all cases of hardship and thus enhance the bewilderment of the layman. As we anticipated in our Report on the Specific Relief Act[1], the better course would be to adopt a general exception to cover all cases of contracts conferring benefits upon third parties and dispense with the particular instances where the rule of privity should not apply. We consider the recommendation of the Law Revision Committee best suited for the purpose, and recommend that a separate section be incorporated on the lines thereof[2].

17. Another major topic which has received our particular attention and which deserves to be mentioned at this stage is the subject of quasi-contract, as it is commonly known. Quasi-contracts.

This subject is dealt with in Chapter V of our Act under the head—'certain relations resembling those created by contract'. We prefer to retain the present title of the chapter because it is more descriptive and comprehensive than some other expressions which are also used to indicate relations of this nature, for instance, 'Quasi-Contracts', 'Contracts implied in Law' and 'Constructive Contracts'. This chapter, however, makes an inadequate provision for the obligations resembling those created by contract. While referring to this subject, Lord Wright observed that the Indian Contract Act dealt with it in a very unsatisfactory manner[3]. With this observation we are in agreement and propose to make exhaustive

[1] Ninth Report of the Law Commission, para. 53.
[2] *Vide* s. 37-A of App. I.
[3] Lord Wright, Legal Essays & Addresses, p. 53.

provisions for such obligations and suggest that the Chapter be made more comprehensive.

18. The best theoretical basis of Quasi-Contract is the principle of 'unjust enrichment' or as Professor Winfield would prefer to call it, 'unjust benefit'. This is derived from the old maxim of Roman Law: *'Nemo debet locupletari ex aliena jactura'*. No man should grow rich out of another person's loss. In *Fibrosa* v. *Fairbairn*[1], Lord Wright said:

> ".....any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

Denning L. J. (as he then was), is another exponent of the doctrine. In *Brewer Street Investments Ltd.* v. *Barclays Woolen Co. Ltd.*[2], he said:

> "The proper way to formulate the claim is on a request implied in law or, as I would prefer to put it, on a claim for restitution."

Underlying the law of restitution is the conception that no one should unjustly enrich himself at the expense of his neighbour. "The conception of restitution is the prevention of unjust enrichment[3]".

It may be noted, however, that as to the precise position of this doctrine in England there does not seem to be so

[1] (1943) A.C. 32 (61).
[2] (1954) 1 Q.B. 428 (436).
[3] Sir Alfred Denning, Changing Law, p. 655.

far a general agreement. Lord Porter, for example, observed:

> "The exact status of the law of unjust enrichment is not yet assured[1]."

According to Professor Glanville Williams this branch of the law in England is defective[2]. In the U.S.A., the law of restitution has received more adequate treatment as is apparent from the fact that the American Restatement of the Law has devoted more than two hundred sections to the discussion of the principles relating to the subject. In India, whenever a case arose which was not directly covered by any specific provision of the Contract Act, assistance was freely derived by our Judges from the English and American decisions.

19. Situation which attract the application of the law of restitution are so numerous that the categories of quasi-contracts cannot be said to be yet closed. The difficulty of an exhaustive statement of principles and of reducing them to formulas which can be incorporated in a legislative enactment is obvious. To enumerate the various principles which create obligations of this type, as has been done in the American Restatement of the law, is not the work of a legislator. To compress what is contained therein is an impossible task. We recommend that the doctrine of unjust enrichment should be accepted and after making specific provision for well-known cases of unjust enrichment a separate residuary section[3] should be enacted which will cover cases not specifically provided for.

20. The other changes proposed by us will appear from our comments on the provisions of the existing Act, which we now proceed to examine in their serial order.

Examination of the provisions of the existing Act, indicating the changes proposed.

[1]*Reading* v. *Att. General*, (1951) A.C. 507 (513).
[2]Law Reform and Law Making, p. 71.
[3]*Vide* s. 72B, App. I.

PART II

Proposals relating to sections.

Preamble.

21. As stated earlier[1], we have sought to make the provisions of the Act as exhaustive as possible[2]. But we are afraid that there may still remain cases not provided for. Such cases will have to be decided on principles of 'justice, equity and good conscience.' But this expression ought no longer be construed in the narrower sense of the rules of English law. It should be given the widest significance. This, however, is a matter which concerns the revision of the various State Acts relating to the civil courts[3], which now provide the statutory sanction of resorting to these principles.

Be that as it may, since the revised Act cannot claim to be an exhaustive code, we do not propose to make any change in the wording of the Preamble.

Sec. 1.

22. In section 1, we suggest that the word "Indian" be dropped from the title of the Act.

In conformity with the recommendation in our previous Report, we have omitted all the Illustrations from the Act.

23. Both the expressions 'usage of trade' and 'custom of trade' have been used in the Act. There being a vital difference between the two expressions, it is necessary to retain both. Usage is habitual practice which is not a source of law, although it has some legal effects. Custom, provided that it fulfils the necessary conditions, is a source of law. The effect of usage, however, is to add a term to the contract, which either expressly or impliedly was entered into with that usage in view. The usage, thus, can be excluded by a provision in the contract to the contrary[4].

24. Another difference between usage and custom is that usage need not be immemorial[5]. Usage cannot change a rule of law, but usage may so affect the meaning of a

[1]Para. 3, *ante*.

[2]E.g., Our recommendations as to Bailments, Agency and Quasi-Contracts.

[3]S. 37 of the Bengal, Agra and Assam Civil Courts Act, 1887; S. 16 of the Madras Civil Court Act, 1873; S. 26 of Bombay Regulation IV of 1829.

[4]Keeton : Elementary Principles of Jurisprudence, 81.

[5]*Dalby* v. *Hirst*, 21 R. R. 577 (580).

contract that a rule of law which would be applicable in the absence of the usage becomes inapplicable. Long continued usage may develop a rule of law in accordance with the usage[1]. Neither usage nor particular custom can be incompatible with the statute law[2]. We, therefore, think that in the last clause of section 1, the comma was rightly put by the legislature between the expressions 'nor any incident of any contract' and 'not inconsistent with the provisions of this Act'. The latter expression also governs 'nor any usage or custom of trade' also. The view of the Privy Council in *Irrawaddy Flotilla Co.* v. *Bugwandas*[3] does not appear to us to be correct. The section which was read by the Privy Council did not contain the comma between the aforesaid two expressions. Furher, Counsel conceded in argument that the words 'not inconsistent with the provisions of this Act' were not connected with the clause 'nor any usage or custom of trade'. Usage or custom, whether particular or general, must yield, wherever in conflict with statute, unless expressly saved thereby. "It is a self-evident contradiction to my mind to say that the general law does not allow the deduction and that there is a universally established usage to allow it. A universal usage which is not according to law cannot be set-up to control the law[4]". We are of the view that usage and custom are operative only if not inconsistent with provisions of the Act and this should be made clear by a suitable amendment of section 1.

25. Our views relating to consideration have already been explained. The Director of Legal Studies, Law College, Madras, has suggested that it should be expressly provided that consideration must be real and of some value in the eye of law. We think that this quality of consideration is implicit in the term itself and there being no doubt on this question, further clarification does not seem to be necessary. Sec. 2. Cl. (d).

26. The Director of Legal Studies has also made the suggestion that it should be provided in section 2(g) that agreements of imperfect obligations are not void, but only Cl. (g).

[1]Restatement of the Law on Contract, S. 249 (*a*), p. 355.
[2]Keeton : op. cit., p. 81.
[3]18 Cal. 620 (627).
[4]Earl C. J. in *Meyer* v. *Dresser*, 143 E. R. 1280 (1286).

unenforceable. He has mentioned an unstamped agreement as an instance of such a case. Such an instrument, which is a record of an agreement, is neither receivable in evidence nor can be acted upon (Sec. 35, Stamp Act). Since the decision of the Privy Council in *Mahanth Singh* v. *U Ba Yi*[1], the law is well established that the expression "unenforceable by law" does not mean unenforceable by reason of some procedural regulation, *e.g.*, the law of limitation, but unenforceable by reason of substantive law. In view of this, it is unnecessary to introduce the suggested change.

Sec. 3. 27. The Bihar Lawyers' Association has suggested that 'and' should be substituted for 'or' before 'which has the effect of communicating it'. We have also given due consideration to the comment of Pollock and Mulla[2] on the matter. The learned commentators observed that to get the sense that an act intended to communicate a proposal etc., but failing to do so, is not a communication at all, we should have to read 'and' for 'or' in the last clause. We, however, feel that no change need be recommended inasmuch as the existing language has not so far caused any difficulty in the courts.

Section 4. 28. The Director of Legal Studies, Madras, has expressed the opinion that section 4 needs clarification and has suggested that for the case where a letter of acceptance is posted and thereafter the acceptor revokes it by a telegram or another letter and both reach the proposer, it would be better to lay down that there is a presumption that the revocation is valid. In our view, this suggestion does not pay adequate regard to the language of section 5 according to which the acceptance may be revoked at any time before or at the moment when the letter communicating it reaches the party concerned but not afterwards. We, therefore, find ourselves unable to accept the above suggestion.

Sec. 5. 29. No change is necessary in section 5.

Sec. 6. 30. A suggestion has been made by the Director of Legal Studies, Madras, that it should be provided that the knowledge of the offeror's intention to revoke, from

[1]A. I. R. 1939 P. C. 110 (113).
[2]Pollock & Mulla : op. cit., 35.

whatever source it reaches, is good notice of revocation. This question was posed and answered by Anson thus:

> "Suppose a merchant to receive an offer of a consignment of goods from a distant correspondent, with liberty to reserve his answer for some days. Mean time an unauthorized person tells him that the offeror has sold or promised the goods to another. What is he to do? His informant may be right, and then, if he accepts, his acceptance would be worthless. Or his informant may be a gossip or mischief-maker, and if on such authority he refrains from accepting he may lose a good bargain[1]".

We are not prepared to accept the suggestion as we feel that this innovation in Indian Law may lead not only to inconvenience but may also open the door to perjury.

31. The Director of Legal Studies, Madras has invited us to examine section 7(2). In his view, there is no justification in the case contemplated by the latter part of the sub-section for laying down that the proposer must again write back to the acceptor. We have given due consideration to this matter and we see no good reason to recommend any alteration of the law on this point. Sec. 7.

32. It is not clear whether the expression "performance of the conditions of a proposal" means a complete performance, or, even partial performance is sufficient. If the former view is correct the law may work serious injustice in some cases. A case of such injustice, generally cited, is that of a person to whom an offer has been made of payment of a certain sum in consideration of his completing a piece of work. He nearly completes the work and then the offer is revoked. The English Law Revision Committee[2] has recommended the introduction of the following rule: "A promise made in consideration of the promisee performing an act shall constitute a contract as soon as the promisee has entered upon the performance of the act, unless the promise includes expressly or by necessary implication a term that it can be revoked before Sec. 8.

[1]Anson : Principles of the English Law of Contract (19th edn.), 48.
[2]Sixth Interim Report, p. 31.

the act has been completed.[1]" In order to prevent such cases of injustice and to clear up the ambiguity in the language of the section, we suggest that the aforesaid recommendation be adopted and introduced in section 8.

Sec. 9.

33. Both proposal and acceptance may take place without express words. Hence the rule that a promise may be express or implied. The section assumes the existence of the rule, but does not lay it down. As it stands at present, it is merely a defining section. We suggest that it should categorically state the rule.

Sec. 10.

34. No change is necessary in section 10.

Sec. 11.

35. There is conflict of authority upon the question as to how far in the case of a minor's agreement procured by him by fraudulent concealment of his age, the Court will relieve the other party to the agreement from the effects of the fraud. One view is represented by the Full Bench case in *Khan Gul* v. *Lakha Singh*[2]. In that case two questions were referred to for decision:

(i) Whether a minor who, by falsely representing himself to be a major, has induced a person to enter into a contract, is estopped from pleading his minority to avoid the contract?

(ii) Whether a party who, when a minor has entered into a contract by means of a false representation as to his age, whether he be defendant or plaintiff, in a subsequent litigation, refuse to perform the contract and at the same time retain the benefit he may have derived therefrom?

Shadi Lal, C. J., delivering the majority judgment held that—

(i) Where an infant has induced a person to contract with him by means of a false misrepresentation that he was of full age, he is not estopped from pleading his infancy in voidance of the contract and that section 115 of the Evidence Act should be read subject to section 11 of the Contract Act;

[1]Sixth Interim Report, para. 50, Recommendation no. 7.
[2]A. I. R. 1928 Lah. 609.

(ii) a false representation by an infant that he was of full age, gives rise to an equitable liability. The Court while relieving him from the consequences of the contract, may in the exercise of its equitable jurisdiction, restore the parties to the position which they occupied before the date of the contract; and

(iii) the doctrine of restitution which finds expression in section 41 of the Specific Relief Act is not confined to the cases covered by that section and rests upon the principle that an infant cannot be allowed to take advantage of his own fraud. This doctrine is applicable whether the minor is the plaintiff or the defendant.

In arriving at the above conclusions, the learned Chief Justice emphasised that the Court in granting the above relief does so, not because there is a contract which should be enforced but because the transaction being void, does not exist and the parties should revert to the condition in which they were before the transaction. This is not the performance of the contract but the negation of it.

36. The opposite view is represented by the case of *Ajudhia Prasad* v. *Chandanlal*[1] in which Sulaiman, C. J., delivering the judgment of the Full Bench, while holding that the minor is not estopped from pleading that the contract is void on the ground of his minority, held that—

(i) Where a contract had been induced by a false representation made by an infant as to his age, he is liable neither on the contract nor in tort;

(ii) Where a contract of transfer of property is void and such property can be traced, the property belongs to the promisee and can be followed; but where the property is not traceable, the grant of compensation would be tantamount to enforcing a void contract under the cloak of an equitable doctrine.

In both the above cases reference was made to the case of *Mohori Bibi* v. *Dharmodas Ghose*[2], where the Judicial Committee, in a suit by a minor through his next friend

[1]A.I.R. 1937 All. 610..
[2]30 Cal. 539.

for a declaration that a mortgage deed executed by him was void and for its cancellation, had arrived at the following conclusions:—

(i) The question whether a contract is void or voidable presupposes the existence of a contract and cannot arise in the case of an infant;

(ii) sections 64 and 65 start from the basis of there being an agreement between competent parties; and

(iii) section 41 of the Specific Relief Act applies to the case of instruments executed by minors.

37. Pollock and Mulla[1] have expressed the view that that judgment of Shadi Lal, C. J., in the Lahore case is correct and we share this view. Indeed, we have already expressed our preference in favour of the judgment of Shadi Lal C. J., in our report on the Specific Relief Act[2]. We agree with the proposition that in ordering compensation, the Court is not giving effect to a contract but is doing its best to put the parties, so far as possible, in the position which they occupied before the void transaction took place and from which one of them was induced to depart by reason of the minor's fraud. This view appears to be more in consonance with the principles of equity and justice. It appears to us incongruous that while sections 38 and 41 of the Specific Relief Act apply to cases of minors, the principles underlying those sections should not be applicable to cases under the Contract Act. We feel that the Judicial Committee had not correctly interpreted section 65 and we are of the opinion that an agreement is 'void' or 'is discovered to be void' even though the invalidity arises by reason of the incompetency of a party to a contract. We recommend that an Explanation be added to section 65 to indicate that that section should be applicable where a minor enters into an agreement on the false representation that he is a major.

Sec. 12.

38. The case of a person who is so drunk that he cannot understand the terms of a contract and form a rational judgment as to its effect on his interest would be covered by the definition contained in this section, and so will be the case of a sane man who suffers from the above defects,

[1]Pollock & Mulla, op. cit. 77.
[2]Report on Specific Relief Act, para. 90.

on account of delirium and fever. We think that the section is clear and we do not propose any change therein.

39. No change is considered necessary in sections 13-14. Sec. 13-14.

40. The proper function of the Indian Penal Code is to create offences and not merely to forbid. A penal code forbids only what it declares punishable. There are laws other than the Indian Penal Code performing the same function. We suggest that the words "Any act forbidden by the Indian Penal Code" should be deleted and a wider expression be substituted therefor so that penal laws other than the Indian Penal Code may also be included. Sec. 15.

The Explanation should also be amended to the same effect.

41. There are some cases in which on principles of equity, relief has been given against a hard and unconscionable bargain, even though there was no question of undue influence involved[1]. We favour the view taken in *Kesavulu* v. *Arithulai Ammal*[2] that unless undue influence is proved, no relief can be given on the ground of unconscionableness of a contract. Sec. 16.

This section needs no change. Sec. 17.

42. No change appears to be necessary in section 17. Sec. 18.

43. Pollock and Mulla[3] have offered strong criticism of the language of this section and have described it as one of the least satisfactory in point of form. They have observed that in sub-section (1) the use of the word 'warranted' in a sense (whatever that sense may precisely be) unknown to the law and in a subject-matter where the words 'warranted' and 'condition' have already caused quite enough trouble, is elementary fault. The learned authors think that sub-section (2) is obscure and apparently useless and that sub-section (3) seems to involve confusion between contracts voidable because consent was obtained by misrepresentation and transactions which could have no legal effect, except possibly by way of estoppel because there was no real consent at all. For the reasons set out hereunder we do not think that the language of the section should be changed.

[1]E.g., *Kirparam* v. *Sami-ud-din*, 25 All. 284.
[2]36 Mad. 533.
[3]Pollock & Mulla, op. cit., 127.

As an illustration of the use of the word 'warranted', Pollock and Mulla[1] cited the decision of Maclean, C. J., in *Mohan Lall* v. *Sri Gungaji Cotton Mills Co.*[2]. They illustrated the meaning of the expression 'positive assertion' by reference to a Punjab case[3]. They have also quoted cases arising under sub-sections (2) and (3). It is clear that no difficulty has arisen in the application of the section so far. The grammatical meaning of the word 'warranted', *viz.*, 'justified', seems to be fairly clear and we do not think that in the context this word is likely to be interpreted in the sense of 'guaranteed'. Reference to English authorities on the subject of innocent misrepresentation entitling the party whose consent was obtained by such misrepresentation is not helpful. Anson[4] has remarked that the reports contained few instances of contract held to be voidable for innocent misrepresentation.

We do not, accordingly, recommend any change in this section.

Sec. 19.

44. The second paragraph of the section merely states what is involved in the conception of a contract being voidable. Pollock and Mulla[5] opine that the thought underlying this paragraph is not really clear and point out cases in which restitution is not literally possible, for example, if the owner of an estate, subject to a lease for an unexpired term, contracts to sell it to a purchaser who requires immediate possession and conceals the existence of the lease, the purchaser cannot be put in the same position as if the representation that there was no lease, had been true, or where A sells a house to B and by some blunder of A's agent, the annual value is represented as being Rs. 2,000 when it is in truth only Rs. 1,000. According to the letter of the present paragraph, so say the learned authors, we may insist on completing the contract and on having the difference between the actual and the stated value paid to him by A and A's successor-in-title for all time. Obviously, such could not be the intention of the Legislature. In order to clarify the intention, we suggest that a qualification be added so that the power of restitution be limited to the extent considered reasonable by the Court. In the consideration of this question the Court, of

[1]Pollock & Mulla: op.cit., 129-130.
[2]4 C.W.N. 369 (388-389).
[3]*Currie v. Rennick*, 1836 P. R. No. 41.
[4]Anson: op.cit., 187.
[5]Pollock & Mulla: op.cit., 135-136.

course, will examine, *inter alia*, whether it is in the power of the party against whom the contract is voidable to perform it fully.

It should also be provided that if the fraud or misrepresentation is proved but the Court refuses to enforce the contract at the option of the party aggrieved for some reason, it would be open to the Court to award compensation for the injury caused by the fraud or misrepresentation.

45. The Exception does not apply to active fraud as distinguished from fraudulent silence and innocent misrepresentation. The 'comma' after the word 'silence' in the Exception creates the impression that the word 'fraudulent' qualifies both 'misrepresentation' and 'silence'. The correct interpretation, however, is that the word 'fraudulent' qualifies only 'silence'. This is also the judicial opinion[1]. Therefore, the 'comma' after the word 'silence' may be deleted.

46. No change is necessary in sections 19A to 22. Sec. 19A-22.

47. Pollock and Mulla[2] point out that the correct expression is the 'consideration for a promise' and not 'the consideration of an agreement'. Strictly speaking this criticism is correct. Even the existing language, however, can possibly be justified on the ground that an agreement consists of a promise or promises. Be that as it may, we do not think it necessary to alter the language of the section in this respect, particularly when we are not aware of any case in which the existing language has created any difficulty. Sec. 23.

48. In considering the validity of a contract in relation to marriage, the Hindu Marriage Act, 1955 and the modern trends in society have to be borne in mind. Under that Act the bridegroom must complete the age of eighteen and the bride fifteen years to qualify for marriage. Where the bride has not completed the age of eighteen, the consent of her guardian in marriage, if any, has to be obtained for the marriage. Thus, the cases where consent of guardian in marriage of a bride would now be necessary, are bound to be comparatively few. No question can arise of any person acting as guardian of a bridegroom among Hindus. Before the Hindu Marriage Act, the question

[1]See *Niaz Ahmad* v. *Parshotam Chandra*, 53 All. 314.
[2]Pollock & Mulla: op. cit., 154.

arose a number of times whether an agreement to pay money to a parent or guardian of a bride or bridegroom in consideration of their consent to the betrothal is immoral or opposed to public policy. The decisions have varied in result. One view[1] was that every agreement to pay money to the father or guardian of a girl in consideration of his consent to her marriage is not necessarily unlawful and each case should be judged by its own circumstances. According to this view, such an agreement would be opposed to public policy only if the parents or the guardians are not seeking the welfare of the girl but are giving her an ineligible husband. According to the other view, an agreement to pay money to the parent or guardian of the minor in consideration of his consent to give the minor in marriage is *per se* opposed to public policy[2]. The consequence of this view is that in case of breach of agreement to give the daughter in marriage, a suit for damages does not lie and the money payable to the bridegroom's father cannot be recovered. Nor can the amount be recovered by the parent or guardian after the marriage is performed. But, where the agreed sum has been paid in advance, the same is recoverable if the marriage is not performed. We are of the view that such an agreement should be treated as immoral and opposed to public policy, and we suggest that in order to resolve this conflict in judicial decisions, a section should be added declaring that a marriage brocage agreement, *i.e.*, an agreement to procure marriage for reward and an agreement for payment of money in consideration of a parent or guardian's consent to the marriage of the child, whether major or minor is unlawful and void.

49. There is also a conflict of authority on the question whether past co-habitation is lawful consideration. One view[3] is that an agreement to pay the allowance by reason of past co-habitation is really an agreement to compensate the woman for past services voluntarily rendered to him for which no consideration is necessary. Another view[4] is that past co-habitation is not a good consideration for the promise to pay for it, and that a consideration

[1] *Baldeo Sahai* v. *Jumna Kunwar*, 23 All. 495.
[2] *Kalavgunta Venkata Kristnayya* v. *Kalavgunta* 32 Mad. 185 (F. B.)
[3] *Dhiraj Kaur* v. *Bikramajit Singh*, 3 All. 787.
[4] *Hussain Ali* v. *Dinbai*. A. I. R. 1942, Bom. 135.

which is immoral at a time, and, therefore, would not support an immediate promise to pay, does not become innocent by being past. The Patna High Court took the view that a contract to enter into the relation of a protector and mistress was immoral and unenforceable in law; but the case of a contract to compensate for what she had lost on account of past association with the promisor was not immoral. The Allahabad High Court[2] has taken the view that adultery, in India, being an offence against the criminal law, co-habitation, past or future, if adulterous, is not merely an immoral but an unlawful consideration. In England, such an agreement is void on the ground that past co-habitation is no consideration. In the American Restatement, the law is thus stated:

> "A bargain, in whole or in part, for or in consideration of illicit sexual intercourse or a promise thereof, is illegal but subject to this exception such intercourse between parties to a bargain previously or subsequently formed, does not invalidate it"[3].

We are, however, of the opinion that in view of the fact that such cases rarely come to the Courts, no specific legislation on the subject is necessary.

50. The rule laid down in this section presupposes that the agreement is indivisible. Sec. 24.

In order to make the provision comprehensive, it should also deal with the case of distinct promises based on distinct considerations. It is settled in England[4] as well as in India[5] that where there are such promises and some of the promises or considerations are unlawful and they can be separated from the lawful promises or considerations (as the case may be), the agreement shall be void only to the extent of the promises which are unlawful or are based on unlawful consideration.

51. In paragraphs 10-11, *ante*, we have explained the changes proposed by us in section 25. Sec. 25.

[1] *L. B. Godfrey* v. *Mt. Parbati*, A. I. R. 1938 Pat. 502.
[2] *Alice Mary Hill* v. *William Clarke*. 27 All. 266. Cf. *Mt. Mahtab-unnissa* v. *Ria Faqat Ali*, A. I. R. 1925 All. 474.
[3] American Restatement on Contract, Vol. 2, s. 589, p. 1095.
[4] Chitty: Contracts, (21st edn.) Vol. 1, 60.
[5] *Dharamchand* v. *Jhamsa*, A. I. R. 1931 Nag. 6.

Sec. 26. 52. The English Law[1] on the subject may be stated thus: A contract which is in general restraint of marriage, *i.e.*, the object or effect of which is to restrain or prevent a party from marrying any person or which is deterrent to marriage in so far as it makes any person uncertain whether he may marry or not, is void. A contract not to marry any person other than the party to it was held to be void on the ground that if that party had chosen not to marry him he was restrained from marrying at all. A contract that the plaintiff would not marry within six years was held to be void, there being no circumstance showing that the restraint was prudent or proper. Prohibition against marrying from among domestic servants has been held to be valid as the person restrained was free to marry any other woman. Thus, the prohibition against marrying a particular person, or persons identified by names or as belonging to a specified class is good. Prohibition against second marriage is sometimes held to be valid[2]. Whether an agreement in partial restraint of marriage is void would depend on the circumstances of each case. There may be circumstances, *e.g.*, ill-health of one of the spouses, which may justify a contract that a person shall not marry within a certain number of years.

In *Rao Rani* v. *Bulab Rani*[3], the Allahabad High Court has expressed doubt on the question whether partial or indirect restraint of marriage was within the scope of section 26. This doubt must be resolved and it should be provided that an agreement in partial restraint is void only if the Court regards it as unreasonable in the circumstances of the case.

Sec. 27. 55. Pollock and Mulla[4] have remarked that this section follows the New York Draft Code and have described that Code as the evil genius of the Contract Act. The Allahabad High Court also observed that "it is unfortunate that section 27 has been moulded upon the New York Civil Code and seriously trenches upon the liberty of the individual in contractual matters affecting trade[5]". The present section does not reproduce the English Common Law and

[1]Halsbury: Laws of England (3rd edn.), Vol. 8, 135.
[2]*Allen* v. *Jackson*, (1875) 1 Ch. D. 399.
A.I.R. 1942 All. 351 (353).
[4]Pollock & Mulla : op. cit., p. 224.
[5]*Bholanath* v. *Lachmi Das*, 53 All. 316 (322).

invalidates many agreements which are allowed by that law. The section was enacted at a time when trade was yet undeveloped and the object underlying the section was to protect the trade from restraints. As Kindersley, J. observed in *Oakes & Co.* v. *Jackson*[1]. "Trade in India is in its infancy and the legislature may have wished to make the smallest number of exceptions to the rule against contracts whereby trade may be restrained[1]."

But today, trade in India does not lag far behind that in England or the United States and there is no reason why a more liberal attitude should not be adopted by acknowledging such restraints as are reasonable not only as between the parties to the agreement but also as regards the general public. We recommend that section 27 be suitably amended to permit such reasonable restraint.

56. The Government of Bihar has suggested that it should be enacted that an agreement in restraint of trade when entered into with the State or the Central Government, should not be void. Consistently with the object underlying the section, we cannot make a recommendation in favour of such an exception.

57. Decided cases reveal[2] a divergence of opinion in relation to certain classes of insurance policies with reference to the applicability of this section. On examination, it would appear that these cases do not really turn on the interpretation of the section but hinge on the construction of the insurance policies in question. The principle itself is well recognized that an agreement providing for the relinquishment of rights and remedies is valid but an agreement for relinquishment of remedies only falls within the mischief of section 28. Thus, in our opinion, no change is called for by reason of the aforesaid conflict of judicial authority. Sec. 28

58. The Government of Bihar has suggested that Exception 1 be widened by substituting the words 'the parties will be bound by the award' in place of 'only the amount awarded in such arbitration shall be recoverable'. We

[1] 1 Mad. 134 (145).

[2] *Hirabhai Narotama Das* v. *The Manufacturer's Life Insurance Co.*, 16 I. C. 1001. Cf. *Baroda Spinning and Weaving Co., Ltd.* v. *Satyanarayana*, 38 Bom. 344 (348-349).

feel that there is good reason in support of this suggestion and we recommend accordingly.

Sec. 29. 59. No change is necessary in section 29.

Sec. 30. 60. The question has frequently arisen in Courts as regards the validity of the agreements collateral to wagering contracts. It has been uniformly decided by all the High Courts, other than the Bombay High Court, that though an agreement by way of wager is void, a contract collateral to it, or in respect of a wagering agreement is not void and suits brought by brokers or agents against their principals to recover brokerage or commission in respect of transactions entered into by such brokers or agents or for indemnity for loss incurred by them in such transactions on behalf of their principal have been decreed, even though contracts in respect of which the claims were made were contracts by way of wager. Similarly, it has been held that an agent who has received money on account of a wagering contract is bound to pay the same to his principal. In the State of Bombay, however, the law is different. There contracts collateral to or in respect of wagering transactions are governed by the Act for Avoiding Wagers (Amendment) Act, 1865[1]. That Act was passed to supply the defects discovered judicially in the Act for Avoiding Wagers Act, 1848[2]. Act XXI of 1848 which excluded suits on wagering transactions has been repealed, but Bombay Act III of 1865 is still in force. Sections 1 and 2 of that Act run as follows:

> "1. All contracts, whether by speaking, writing or otherwise knowingly made to further or assist the entering into, effecting or carrying out agreements by way of gaming or wagering, and all contracts by way of security or guarantee for the performance of such agreements or contracts, shall be null and void; and no suit shall be allowed in any Court of Justice for recovering any sum of money paid or payable in respect of any such contract or contracts, or any such agreement or agreements as aforesaid.
>
> 2. No suit shall be allowed in any Court of Justice for recovering any commission, brokerage, fee

[1]Bombay Act III of 1865.
[2]Act XXI of 1848.

or reward in respect of the knowingly effecting or carrying out, or of the knowingly aiding in effecting or in carrying out, or otherwise claimed or claimable in respect of, any such agreements by way of gaming or wagering or any such contract as aforesaid, whether the plaintiff in such suit be or be not a party to such last-mentioned agreement or contract, or for recovering any sum of money knowingly paid or payable on account of any persons by way of commission, brokerage, fee, or reward in respect of any such agreement by way of gaming or wagering or contract as aforesaid".

The result is that a contract collateral to or in respect of a wagering agreement is void in the Bombay State.

61. In England, the Gaming Act, 1892[1] was passed in order to render agreements collateral to wagering contracts void. Before this Act was passed such agreements were not void. This Act was passed in consequence of the decision in *Read* v. *Anderson*[2]. In that case a betting agent had made bets on behalf of his principal. After the bets were made and lost, the principal revoked the authority to pay which had been conferred upon the betting agent. The betting agent, however, paid the bets and sued the defendants to recover the amounts so paid. It was held that the agent was entitled to recover. Section 1 of the aforesaid Gaming Act of 1892 runs thus:

"1. Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of the eight and ninth Victoria, Chapter one hundred and nine, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any sum of money".

[1] 55 & 56 Vict, c. 9.
[2] 13 Q.B.D. 779.

62. Pollock and Mulla[1] have expressed the hope that in the revision of the Contract Act, the provision of the Bombay Act will be incorporated in section 30. We share the view that in the interest of uniformity of law on this subject, the salutary provisions of the Bombay Act should be incorporated in section 30 and we recommend accordingly.

Secs. 31-36. 63. No change is recommended in sections 31 to 36.

Sec. 37. 64. The case of assignment of contracts properly belongs to the law of transfer and the Chapter on Actionable claims in the Transfer of Property Act is the suitable place for dealing with that subject. No provision need be made on this point in the Contract Act.

Sec. 38. 65. There has been a divergence of opinion as to the true meaning of the last paragraph of this section, namely, 'An offer to one or several joint promisees, has the same legal consequences as an offer to all of them'. This divergence has arisen in connection with the question whether payment by a debtor to one of a number of joint creditors, operates as a discharge of the debt. One view, whose chief exponent was White C.J., of the Madras High Court, is that all the joint promisees get the benefit of the legal consequences, whatever those consequences may be, of an offer, or a tender, to one of them. But the legislature in enacting this part of section 38 was not contemplating the legal consequences of an offer which has been accepted but the legal consequences of an offer which has been refused. Consequently, it does not follow from the section that the acceptance of payment by one of several promisees operates as a discharge of the claims of the others[2]. This opinion was adopted by a Full Bench in the Punjab High Court[3], and by the High Courts of Calcutta[4], Allahabad[5], Nagpur[6], Patna[7] and Mysore[8]. The opposite view is represented by the majority opinion in *Annapurnamma* v.

[1]Pollock & Mulla: op. cit., 157-258.
[2]In *Ramasami* v. *Muniyandi*, (1910) 20 M. L. J. 709 and in the dissenting opinion of the learned C.J. in *Annapurnamma* v. *Akkayya*, 36 Mad. 544.
[3]*Mathra Das* v. *Nizam Din*, 41 I. C. 921.
[4]*Abdul Hakim* v. *Adwaita Chandra*, 22 Cal. W.N. 1021.
[5]*Shyam Lal* v. *Jagannath*, A. I. R. 1937 All. 527.
[6]*Madheo Singh* v. *Balmukund*, A. I. R. 1948 Nag. 279.
[7]*Syed Abbas* v. *Misrilal*, A.I.R. 1921 Pat. 27.
[8]*Venkata Setty* v. *Rangasetty*, A.I.R. 1952 Mys. 68.

Akkayya[1], in which Sankaran Nair, J. said that it was difficult to impute an intention to the legislature that the promisor was entitled to make the offer, though the promisee was not entitled to accept it. According to this view, if the promisor was entitled to offer payment to one of the promisees which the latter was entitled to accept, the promisor cannot be held liable to pay over again to the other promisees, and thus one of several payees can give a valid discharge of the entire debt without the concurrence of other payees.

Pollock and Mulla[2] have expressed agreement with the above mentioned judgment of White, C. J. That is also, as shown above, the preponderating opinion in the High Courts. The English Law is thus stated in Halsbury's Laws of England—

> "In the case of a debt owing to two or more persons jointly, a tender made to one of the joint creditors on behalf of all, operates as a tender to the all"[3].

In our opinion, the apparent ambiguity in the last paragraph of section 38 should be clarified by adding a qualification to the word "offer" and stating—

> "An offer to one of several joint promisees, which has not been accepted, has the same legal consequences as an offer to all of them".

We think that section 38 is not concerned with the question whether an offer when accepted by one of the promisees operates as a discharge binding on all the promisees. In order to achieve that result, all the promisees must concur in the acceptance of the offer.

66. In our report on the Limitation Act[4] we stated that the correct view was that one of several creditors could not give a valid discharge so as to bind the others and had suggested that the Contract Act might be suitably amended accordingly. In consonance with that recommendation we suggest that a separate section[5] be added after section 38.

[1]36 Mad. 544.
[2]Op. cit. 292.
[3]Halsbury, 3rd Ed., Vol. 8, 172.
[4]Third Report of the Law Commission, para. 27.
[5]*Vide* s. 38A, App. I.

Secs. 39-40. 67. No change is recommended in sections 39-40.

Sec. 41. 68. It has been suggested that the Indian Law should adopt the principle that the discharge of a debt by a third person is effectual only if authorised or ratified by the debtor. Pollock and Mulla[1] say that it is not clear that the better opinion is not the other way. We do not recommend any change by reason of the conflict of views on this point. The section, as it stands, has not worked any injustice and we propose to leave it unaltered.

Sec. 42. 69. No change is necessary in section 42.

Sec. 43. 70. The Contract Act treats all contracts as joint and several. The necessary consequence is that it is not open to one promisor who is sued to compel the promisee to sue others. There has, however, been considerable divergence of opinion on the effect of a judgment obtained by the promisee against one out of a number of promisors. In the words of the Federal Court[2], unlike English Law, the Indian Law makes a general liability joint and several, in the absence of an agreement to the contrary. It is, therefore, open to the promisee to sue any one or some of the joint promisors and it is no defence to such a suit that all the promisors should have been made parties. We think that Strachey, C.J., correctly stated the law in *Muhammad Askari* v. *Radhe Ram*[3] when he said: "The doctrine now rests not so much on *King* v. *Hoare*[4] as on the judgment of the Law Lords in *Kendall* v. *Hamilton*[5]. As explained in these judgments the doctrine that there is in the case of a joint contract a single cause of action which can only be once sued on is essentially based on the right of joint debtors in England to have all their contractors joined as defendants in any suit to enforce the joint obligation. The right was in England enforceable before the Judicature Act by means of a plea in abatement, and since the Judicature Acts by an application for joinder which is determined on the same principles as those on which the plea in abatement would formerly have been dealt with. In India that right of joint debtors

[1]Pollock & Mulla : Op. cit. 307.
[2]*Jainarain* v. *Surajmull*, (1949) 12 Fed. L. J. 216 (225).
[3]22 All. 307.
[4]153 E. R. 206.
[5](1879) 4 A. C. 504.

has been expressly excluded by section 43 of the Contract Act, and, therefore, the basis of the doctrine being absent, the doctrine itself is inapplicable. *Cessante ratione legis, cessat ipsa lex*"[1]. The result is that a decree obtained against some of several joint promisors remaining unsatisfied ought not to be held as a bar to a subsequent action against the other promisors. We recommend that this result may be incorporated in the Act by inserting a new section[2].

In this connection, we suggest that while revising the Code of Civil Procedure it should be considered if it is necessary to introduce a specific provision making it clear whether a joint promisor can, when sued for contribution by his co-promisor, resist the suit on the ground that in the creditor's suit (to which the joint primisor was not a party) the co-promisor (suing for contribution) did not negligently or otherwise, set up defences which could have been legitimately raised to defeat the claim.

71. No change is considered necessary in sections 45 to 48. Secs. 45-48.

72. In the case of a contract of loan where the borrower fails to apply to the creditor to appoint a reasonable place for repayment he must make the repayment at the place of the creditor. The Judges in India have, on a number of occasions, applied the principles of the English Common Law that the debtor must seek out the creditor. It appears to us that the section applies to a contract of loan also and the English Common Law doctrine applies only where the debtor failed to apply to the creditor to appoint a reasonable place for repayment. This is in consonance with the decision of the Bombay High Court in *Bharumal* v. *Sakhawatmal*[3]. An Explanation may be added to section 49 incorporating the rule of the English Common Law. Sec. 49.

73. No change is recommeded in sections 50—55. Secs. 50-55.

74. This section marks a departure from the English Common Law to a considerable extent and it is neither Sec. 56.

[1] 22 All. 307 (311, 312).
[2] *Vide* s. 44A, App. I.
[3] A.I.R. 1956 Bom. 111.

profitable nor necessary to examine which of the various theories underlying the doctrine of Frustration in English Law are applicable to cases arising under this section. The Supreme Court of India in the case of *Satyabrata* v. *Mugneeram*[1] has repelled the suggestion that section 56 is not exhaustive. The word 'impossible' is to be construed in its practical rather than in its literal sense. It is worthy of note that the impossibility referred to in the section was never understood to include what is known as commercial impossibility. We are not aware of any occasion when in practice the application of the section, as it stands, has involved any inconvenience or difficulty of interpretation and, therefore, we are in favour of leaving the section intact.

Secs. 57-58. 75. It has been suggested that sections 57 and 58 are superfluous and their subject matter is already covered by S. 24. Sections 57 and 58 deal with reciprocal and alternative promises. We do not favour deletion of these two sections.

Secs. 57 61. 76. No change is necessary in sections 57 to 61.

Sec. 62. 77. A controversy has arisen on the question whether section 62 will apply to a case where the fresh agreement contemplated by the section is entered into after the breach of the original contract. The Calcutta High Court has taken the view that such an agreement can take place only when the original contract is still capable of performance and that the section is a mere legislative expression in India of the English Common Law[2]. Later decisions[3] in that Court have followed this view. In the Madras High Court[4], which has taken the opposite view, the opinion of Kumaraswami Sastri, J. has prevailed[5]. He pointed out that the observations of the learned editors of Smith's Leading Cases[6] and the view of Lord Balckburn in *Foakes* v. *Beer*[7] show that the rules of English Law as to consideration for variation are not founded on any sound principle.

[1]A.I.R. 1954 S.C. 44.
[2]*Manohur Koyal*, v. *Thakurdas*, 15 Cal. 319.
[3]*New Standard Bank* v. *Prabodh Chandra*, A. I. R. 1942 Cal. 87.
[4]*Ramiah* v. *Somasi*, (1915) 29 M.L.J. 125.
[5]*N.M. Firm* v. *Theperumal Chetty*, 45 Mad. 180.
[6]Smith's Leading Cases (13th edn.), 338.
[7]9. A. C. 605.

The Indian legislature did not adopt the principles laid down in *Foakes* v. *Beer*, when it enacted section 62 of the Contract Act. He also pointed out that it was very common in this country for mediators to interfere after a breach of contract takes place and effect a compromise between the parties. We prefer the Madras view and accordingly recommend that it should be made clear that the new agreement may take place either before or after the breach of the original contract.

78. There is no express provision in the Contract Act on the subject of unauthorised alteration of documents. Sections 87, 88 and 89 of the Negotiable Instruments Act, which have, however, adopted the English Common Law to its full extent, have made ample provision for such alterations. Naturally, the Indian Courts have followed the English rule. That rule may be stated thus:

> "If a material alteration is made in any instrument containing words of contract without the consent of the party contracting, this will discharge him from all liability thereon, whether such alterations were made by a party to the contract or by a stranger".[1]

We recommend that this rule be incorporated in a separate section[2].

79. What is a material alteration has been the subject of judicial exposition. "The effect of material alteration will be the same although the original words of that instrument be still legible, or although it be not made in respect of the breach of contract on which the plaintiff is suing"[3]. According to decided cases in England, an alteration is material which affects either the substance of a contract expressed in the document or the identification of the document itself. Alterations are immaterial if they merely express what is already implied in the document or add particulars consistent with the document, as it stands, though superfluous, or, are innocent attempts to correct clerical errors. It has also been established[4]

[1]Chitty, op. cit., Vol. I, 302.
[2]*Vide* s. 67A, App. I.
[3]Chitty, op. cit., Vol. I, 304.
[4]*HongKong and Shanghai Banking Corpn.* v. *Lo Lee Shi*, (1928)A.C. 181.

that alteration by a stranger should not alter the liability of a party to the contract, where no fraud, negligence or assent of such party is involved.

These principles should be embodied in the new section suggested by us.

80. The Government of Bihar suggest that a new sub-section should be added to the following effect: "If there be a breach of any contract, parties thereto may choose to revive the terms of the original contract". As we have accepted the position that a novation can take place even after the breach of the original contract, it does not seem to be necessary to introduce the suggested sub-section.

Sec. 63.

81. This section deals with cases of actual dispensing with, or remission of, performance or extension of time. These acts need not be supported by any consideration. The section does not apply to agreements to dispense with or remit performance or extend time. We have already made a recommendation in respect of such agreements while dealing with section 25.

Sec. 64.

82. No change is recommended in section 64.

Sec. 65.

83. Conflicting views have been taken as to the meaning of the expression 'discovered to be void'. One class of cases in which this conflict has arisen is that of contracts with municipalities and with Government which do not comply with the requirements of the law prescribing the form in which they have to be executed. The question has been, whether in such cases when contracts were partly or fully executed a claim for restitution under section 65 lay. Courts in India took conflicting views. One line of cases followed the House of Lords decision in *Young & Co.* v. *The Mayor and Corporation of Royal Leamington Spa*[1]. That case arose under the Public Health Act which required the contract to be in writing and sealed. The contract had been fully executed by the plaintiff. The corporation had paid certain sums from time to time but refused to pay other large sums which were the balance claimed by the plaintiff. The House of Lords decided that the want of seal prevented the plaintiffs from recovering the sum claimed. The main ground was that the grant of relief to the

[1](1883) 8 A.C. 517.

plaintiff would have the effect of repealing the Act of Parliament and depriving the rate payers of that protection which Parliament intended to secure for them. The hardship of the decision was recognized by Lord Blackburn. This case was followed in India and the case of *Mohori Bibi* v. *Dharmodas Ghose*[1] was applied in which the Privy Council had refused to apply section 65 to a minor's agreement.

In the other line of cases, section 65 and sometimes section 70 was held to be applicable. The hardship in England was removed by the repeal of the provisions of the Public Health Act, 1875 and by the enactment of section 266 of the Local Government Act, 1933[2]. Messrs. Pollock and Mulla[3] found it difficult to appreciate the application of section 65 and section 70 where there was an express statutory prohibition governing the corporation. They realised, however, that 'the above result is not wholly satisfactory; though it may be an accurate statement of the law and a certain sense of incongruity remains'. The recent decisions in India incline in favour of the applicability of section 65 to such cases. The view which has prevailed in the Calcutta High Court is represented by the decision of Sinha J. in *Ram Nagina* v. *G. G. in Council*[4] and by the decision[5] of a Bench of that court which upheld the view taken by Sinha, J. Sinha, J's decision was followed in Assam in *Dharmeshwar* v. *Union of India*[6]. In Madras there has been a current of decisions in favour of this view[7]. The Patna High Court has also followed the view of Sinha J[8].

A contrary view, it may be noted, has been taken by Mukherjee J. of the Calcutta High Court in the case of *Anantha Bandhu* v. *Dominion of India*[9].

> "I cannot persuade myself to believe that an agreement at its very inception in outright disregard of express statute or constitutional provision

[1]30 Cal. 539.
[2]Chitty : op. cit., Vol. 1, 625.
[3]Pollock & Mulla : op. cit., 399.
[4]A. I. R. 1952 Cal. 306.
[5]*Ranendranath* v. *Dhuliyan Municipality*, A.I.R. 1956 Cal. 203.
[6]A.I.R. 1956 Assam 86.
[7]See the cases mentioned in *Madras Corporation* v. *Kothandatoni*, A. I. R. 1955 Mad. 82. As regards the view of the Allahabad High Court see the judgement of Aggarwala J. in *Gonda Municipality* v. *Baichchu*, A. I. R. 1951 All. 736 F. B. (741).
[8]*Dominion of India* v. *Priti Kumar Ghosh*, A. I. R. 1958.
[9]A.I.R. 1955 Cal. 626 (629).

which renders the agreement unenforceable can be said to be discovered to be void within the meaning of S.65, Contract Act. If that was the intention all that S.65, Contract Act, need have said is "whenever an agreement is void", and not "discovered to be void".

In consonance with the preponderance of opinion we recommend that it should be made clear that S.65 applies to cases where an agreement is void by reason of non-compliance with statutory requirements.

84. Divergent views have been taken on the question whether the expression "discovered to be void" covers an agreement void for an unlawful consideration[1]. On a consideration of the whole matter, we have reached the conclusion that section 65 does not apply to agreements which are void under section 24 by reason of an unlawful consideration or object. To such agreements the English rule as embodied in the maxim *in pari delicto potior est conditio possidentis* and its exceptions should apply. That principle has received statutory recognition in section 84 of the Indian Trusts Act and we have adverted to the rule and its exception later in this report.

85. The expression 'discovered to be void' came for interpretation before the Judicial Committee a number of times. In the case of *Harnath Kuar* v. *Inder Bahadur Singh*[2], the Committee observed: "An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception as distinct from a contract that becomes void". In the particular case before them, their Lordships held that the discovery as to the void character of the agreement took place only after the misapprehension as to the 'private rights' of the transferor was realised. Later in the case of *Anand Mohan* v. *Gour Mohan*[3], their Lordships laid down that in the absence of special circumstances to the contrary the "discovery" of the agreement must be held to have been made at the time of the agreement itself. This was reiterated in *Hans Raj* v. *Dehra Dun M.T.Co.*,[4].

[1]Cf. *Jijibai* v. *Nagji*, 11 Bom. 693 and *Nathu Khan* v. *Sewak Koeri*, 15 C.W. N. 408 (409).
[2]A I. R. 1922 P. C. 403 (405).
[3]A I. R. 1923 P. C. 189 (191).
[4]A I. R. 1933 P. C. 63 (66).

In *Nisar Ahmad* v. *Mohan Manucha*[1] the Judicial Committee applied section 65 to the case of a mortgage which failed by reason of the absence of permission of the Collector under para. 11 of Schedule III of the Civil Procedure Code. It was held that the case was one which fell within the words "discovered to be void" occurring in section 65. Again in 1943 on the same facts the Privy Council[2] reiterated the applicability of Section 65 and pointed out that in the case of a minor's agreement there is a general incapacity to contract, while para. 11 Schedule III of the Civil Procedure Code imposes on a judgment-debtor only incapacity to transfer property.

Though we are anxious to remove expressions which give rise to a conflict of judicial opinion, we do not consider it advisable to do away with the expression "discovered to be void" inasmuch as in particular circumstances, it may be relevant for the purposes of limitation[3].

86. While dealing with section 11 we have already recommended[4] that a provision may be made in section 65 to the effect that where an agreement is entered into by a minor falsely representing that he is a major, the agreement will be one within the purview of section 65. At the same time we want to make it clear that section 65 should not have any application to cases of agreements entered into with persons incompetent to contract with full knowledge of their incompetency.

87. In our Report on the Specific Relief Act[5] while referring to Privy Council case of *Satgur Prasad* v. *Har Narain*[6] we have suggested by way of abundant caution that the principle underlying section 65 of the Contract Act should be expressly made applicable to voidable contracts where a party relies on the voidability of the contract and avoids it. This should be made clear by suitable changes in the section.

88. No change appears to be necessary in sections 66-67. Secs. 66-67.

[1]A. I. R. 1940 P. C. 204.
[2]*Mohan Manucha* v. *Manjur Ahmad*, A. I. R. 1943 P. C. 29 (33).
[3]*Harnath Kaur* v. *Inder Bahadur*, A. I. R. 1922 P. C. 403 (405).
[4]*Supra*, para. 37.
[5]Ninth Report of the Law Commission, para. 89.
[6]A. I. R. 1932 P. C. 89 (91).

Sec. 68.

89. The Director of Legal Studies, Madras, has suggested that the word 'necessaries' should be defined. But the word has been judicially interpreted on a number of occasions and it is not necessary to give a statutory definition thereof. The word 'necessaries' has been held to include money urgently needed for the requirements of minors and lunatics and is not restricted to what is necessary for elementary requirements, such as, food and clothing. It is now well established that payments or charges connected with legal matters in which minors are concerned would, under certain circumstances, come under the head of 'necessaries'. We think this term should remain elastic and we are unable to accept the suggestion.

Sec. 69.

90. This section has been held to apply only to cases where the plaintiff is not only interested in the payment but is also actuated by the motive of protecting his own interest. We think that this idea is sufficiently expressed by the word 'therefore' and it is not necessary to alter the the language of this section on that account.

There is a conflict of authority upon the question whether this section covers a case of contribution. One view[1] is that it deals with reimbursement, which is different from contribution, and the person who is interested in the payment which another is bound by law to pay must be a person who is himself not bound to pay the whole or any portion of the money. In other words, 'being interested in the payment of money' connotes an idea different from 'being bound by law to pay'. The other view[2] is that a person may be interested in making the payment notwithstanding that he is also liable to pay. In our opinion the former is the better view, and alterations should be made in the section to make this clear.

The principle of contribution is not founded on a contract but is the result of general equity on the ground of equality of burden and obligations. According to Winfield this principle is a head of quasi-contractual liability[3]. There are express provisions for contribution in the Act.

[1]See *Jagapathi Raju* v. *Sadrusanamma Arad*, 39 Mad. 795 ; and *Biraj Krishna* v. *Purna Chandra*, A. I. R. 1939 Cal. 645.

[2]*Ram Lal* v. *Khirlda Mohini*, 18 C.W.N. 113; *Bepat Singh* v. *Shamlal*, A. I. R. 1931 Pat. 234 ; *Vishnu Ram* v. *Seth Pannalal*, A. I. R. 1937 Nag. 152.

[3]Winfield ; Province of the Law of Tort, 163.

Section 43 provides for contribution in the case of joint-promisors while sections 146 and 147 deal with contribution in case of co-sureties. Many cases of contribution would be covered by section 70, but there may still be cases not covered by that section or other Statutes. Some cases of contribution have been decided on general principles without reference to section 70[1]. We think that it should be made clear that section 69 deals with cases of reimbursement and not those of contribution and effect should be given to the view which we have accepted as correct by some suitable change in the language. It is, however, not necessary to devote a separate section to cases of contribution not already covered by the express provisions of this or of other Acts, as such cases will be covered by the residuary section proposed by us[2].

91. We are of the opinion, however, that there should be a separate provision for contribution between joint-tort feasors on the lines of section 6 of the Law Reform (Married Women and Tort-feasors) Act, 1935[3]. The relevant part of that section may be quoted hereunder:

> "6.—(1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> (a)
>
> (b)
>
> (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability of which the contribution is sought.
>
> (2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall

[1] E. g., *Nihal Singh* v. *The Collector of Bulandshahar*, 38 All. 237.
[2] S. 72B, App. I.
[3] 25-26 Geo. 5, c. 30.

have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity".

Since our law of Torts is not yet codified, our Courts have to rely on English Common law, but the rules of common law on the present subject are unsatisfactory and have, accordingly, been replaced by statute. The provisions of the English Act being consonant with the principles of justice, equity and good conscience, we should adopt similar rules by enacting a similar specific provision[1] in our Contract Act, so long as we do not have a separate Code on the law of Torts.

Sec. 70.

92. This section is much wider than the English Law and cases not covered by the Common Law in England would be covered by it. There is a conflict of authority on the question whether the expression 'does anything' in the section includes payment of money. A Full Bench of the Allahabad High Court in *Sheonath* v. *Sarju*[2], agreeing with Varadachariar, J.'s view in *Perumal Chettiar* v. *Kamakshi Ammal*[3], answered the question in the negative, while the Allahabad High Court in an earlier decision[4] and the Calcutta High Court[5] have answered it in the affirmative. We think that the former view is too narrow and the latter one should be accepted. This will necessitate a change in the language of the section.

93. The words "such other person enjoys the benefit thereof" have given rise to controversy and there are conflicting decisions as to their meaning in various Courts, particularly in the Madras High Court. It has been noted that the statement of the law contained in Section 70 is derived from the notes to *Lampleigh* v. *Braithwaite* and resembles the right of the *negotiorum gestor* under Roman Law[6]. The view contained in one line of cases has been forcibly expressed by Sankaran Nair J. in *Yogambal* v. *Naina Pillai*[7]. Basing himself upon English decisions, he laid down that for the application of section 70 it is necessary that the party sought to be charged must not only have benefited by the payment but also have had the

[1] *Vide* s. 69A, App. I.
[2] A. I. R. 1943 All. 220 (232).
[3] A I. R. 1938 Mad. 785.
[4] *Nath Prasad* v. *Baijnath*, 3 All. 66.
[5] *Smith* v. *Dinonath Mookerjee*, 12 Cal. 213.
[6] Stokes : Anglo Indian Codes, Vol. 1, 533.
[7] 33 Mad. 15(18).

opportunity of accepting or rejecting such benefit. Where no such option is left to him and the circumstances do not show that he intended to take such benefit, he cannot be said to have "enjoyed such benefit" within the meaning of the section. He illustrates his view in this manner:

> "Where A is himself interested in the doing of the work there is nothing to show to B that the work is done for him or that A expects any payment from him. The Courts will not, therefore presume that A did the work for B. Similarly where B has no choice in the matter but he has perforce to take the benefit, it cannot be said that B adopts the act or accepts any benefit. Therefore the Courts will not hold B liable".

The learned Judge adopted the note in 'Smith's Leading Cases' where one of the instances of the application of the rule in *Lampleigh's case*[1] was described as: "Where the defendants had adopted and 'enjoyed the benefit' of the consideration." The result was that Sankaran Nair, J. took the view that the requirements of section 70 were identical with the conditions imposed by English Law.

The other view has been stated by Sadasiva Ayyar J. in *Srichandra Deo* v. *Srinivasa Charlu*[2] in which he dissented from the judgment of Sankaran Nair J. He observed:

> "The words of Section 70 of the Indian Contract Act do not oblige us to import all the restrictions imposed by the English decisions, upon the equitable right of a person who honestly does something for another without an intent to do so gratuitously, to recover compensation from that other for the benefit so conferred upon and enjoyed by that other person[3]".

The learned judge followed the decision of the Calcutta High Court in *Jognarain* v. *Badri Das*[4]. It may be noted that a similar view was taken by the Allahabad High Court in *Dorilal* v. *Patti Ram*[5]. In the Madras High Court itself,

[1] 1 Sm. L.C. (13th Fdn.), 148.
[2] 38 Mad. 235.
[3] 38 Mad- 235 (245).
[4] 12 I. C. 144.
[5] 8 All. L. J. 622.

in two subsequent cases[1] the decision in *Srichandra* v. *Srinivasa*[2] was dissented from and the view of Sankaran Nair J. was followed. Pollock and Mulla[3] have expressed the view, that Sankaran Nair J. laid down the law correctly. In our opinion, the word 'enjoyed' imports the idea of conscious acceptance of the benefit. If the person to be charged is unwilling to accept the benefit which is thus forced upon him, he cannot be said to have 'enjoyed' it. The restrictions imposed by English Law are the necessary consequence of the requirement that the circumstances must be such that the request necessary to constitute a cause of action in the case of an executed consideration may be implied. In India we are not fettered by any such requirement. In a case, for example, where a co-sharer makes repairs to an embankment with the result that there is an increase in water, the other co-sharer may or may not use the excess of water or he may not be conscious of the increase. In such a case section 70 would not apply but if he was conscious of the increase and had used the water, he should be held to have 'enjoyed the benefit'. The position can be clarified by substituting the word 'enjoys' by the words 'accepts and enjoys'.

Sec. 71.

94. No change is necessary in section 71.

Sec. 72.

95. This section is restricted to cases of payment or delivery by mistake or under coercion. It should be extended to cover cases where payment or delivery has been made, as a result of the exercise of fraud, misrepresentation or undue influence, or where money or delivery has been obtained by taking undue advantage of the situation of a person entitled under the law to protection under the circumstances. This extension of the section will bring it in line with the English Law[4].

96. The word 'coercion' has not been used in this section in the sense in which it has been defined in section 15. It has been used, in the words of the Privy Council, "in its general and ordinary sense as an English word and its meaning is not controlled by the definition in section 15[5]". The contrary view held by some Courts in India has thus been superseded. In order to remove any possibility of

[1] *Sampath* v. *Rajah of Venkatagiri*, A. I. R. 1931 Mad. 51 and *Lakshmanan* v. *Arunachalam*, A. I. R. 1932 Mad. 92.
[2] 38 Mad. 235.
[3] Pollock & Mulla; Op. cit. 432.
[4] Chitty ; Op. cit., Vol. I, 96.
[5] *Kanhayalal* v. *National Bank of India*, 40 I.A. 56 (65).

doubt, an Explanation should be added in a suitable to state that the definition in section 15 is only for the purposes of the Chapter in which that section is contained.

97. To give effect to the Privy Council decision in *Shiba Prasad* v. *Srish Chandra*[1] which set at rest the controversy whether 'mistake' in section 72 was confined to mistakes of fact or covered mistakes of law also, the words, "whether of fact or law" may be added after the word 'mistake'.

98. There is a conflict of authority on the question whether section 72 will apply to a case where a third party had acquired interest in the property prior to the attachment, deposited the purchase money under 0·21, r. 89 C.P.C. to set aside the sale in execution and subsequently succeeded in his suit for declaration of his right to the property, and such person would be entitled to a refund of the deposit so made by him. The High Courts of Bombay[2], Patna[3] and Madras[4] took the view that section 72 did not apply and the money was not recoverable. The High Court of Madras in later cases[5], however, held that it was recoverable. The decision in *Raman* v. *Kannan*[6] is by Patanjali Sastri, J. (as he then was), and we think that the law is laid down correctly therein. This conflict, however, does not call for any clarification by way of change in the language of the section, because even if the former view be correct the case would be covered by the residuary section[7] proposed by us, as obviously the case would be one of unjust enrichment or unjust benefit.

99. Some writers treat actions on judgments as falling within the area of quasi-contracts. We do not consider it necessary to make any provision for such cases in Chapter V. By reason of procedural provisions suits on judgments passed by Indian Courts are not necessary. Suits on foreign judgments belong to the subject of Conflict of Laws, and we have already got certain provisions on this

[1] A. I. R. 1949 P. C. 297 (301).
[2] *Narayan* v. *Amaguda*, 45 Bom. 1094; *Shanker Rao* v. *Vadhilal*, 57 Bom. 601.
[3] *Raguram Pande*, v. *Deokali*, 7 Pat. 30.
[4] *Kummakutty* v. *Neelakandan*, 53 Mad. 943.
[5] *Satyam* v. *Perraju*, A. I. R. 1931 Mad. 753; *Raman* v. *Kannan*, A. I. R. 1940 Mad. 725.
A. I. R. 1940 Mad. 725.
[7] S. 72B App. I.

subject in sections 13-14 of the Code of Civil Procedure. Hence, it would be advisable to leave this matter outside the Contract Act.

100. The rule in *pari delicto potior est conditio possidentis*, with its exceptions, has been followed in Indian cases and it has also received statutory recognition in section 84 of the Indian Trusts Act. To quote one of such cases[1] a plaintiff's predecessor-in-title had in 1895 successfully executed a benami sale deed of certain property to the defendants' predecessor in order to defeat the claim of a prior equitable mortgagee. This mortgagee at once sued the parties to the benami sale deed and obtained satisfaction of his claim with costs. The result was that the purpose of the sale was defeated. Holding that the plaintiff was entitled to a decree for recovery of land, the Privy Council made the following observations:

> "If, however, he has not defrauded any one, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property which they had assigned away where they had intended to defraud creditors, who, in fact, were never injured But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, 'in pari delicto potior est conditio possidentis'. The Court will help neither party. 'Let the estate lie where it falls."[2]

It was further observed that the purpose of the fraud having not only not been effected, but absolutely defeated, there was nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property.

S.84 of the Trusts Act is, however, confined to transfers of property and may not cover cases of payment of money or delivery of property for illegal purposes. We are of the view that it would be better to have a specific provision relating to such cases.

[1] *Petherpervmal* v. *Muniai*, 35 I. A. 98.
[2] *Ibid.*, 102.

The question is whether the provision should be introduced into the Contract Act or the existing provision in the Trusts Act should be widened to include cases arising out of contracts other than those of transfer of property. In England and in the United States, the principle is re-regarded as a part of the law of contract.

In England, the rule was formulated by Lord Mansfield in 1775 in the case of *Holman* v. *Johnson*[1] and the Court of Appeal has in the case of *Bowmakers Ltd.* v. *Barnet Instruments Ltd.*,[2] remarked that the principle has even been extended since Lord Mansfield's day. Chitty states the rule thus:—

> "If the illegal purpose has not been carried out, the law allows a *locus poenitentiae* to the party who demands the return of money paid before this happens. So either party to an illegal contract may rescind it while it remains executory, and may recover from the other party any money which he may have paid to him thereunder, although, to enable him to do so, he must prove the making of the illegal contract as part of his case. But if the illegal purpose has been wholly or substantially effected or frustrated the law allows no *locus poenitentiae*".[3]

In the American Restatement of the Law, the rule has been thus stated in the Volume on Contract (section 598):

> "A party to an illegal bargain can neither recover damages for breach thereof, nor by rescinding bargain, recovery the performance that he has rendered thereunder or its value".

The doctrine underlying section 84 of the Trusts Act is obviously different. But the conditions for the application of the rule are the same in the Trusts Act as under the principle of quasi-contract and the result is similar. The extension of the provision in section 84 to include the contractual aspect would result in the advantage of having a comprehensive provision relating to the subject of frustration of an illegal purpose instead of having two parallel

[1]98 E. R. 1120, 1121.
[2][1044] 2 All. E. R. 579 (582).
[3]Chitty, Op. cit., Vol. 1, 473.

provisions in two separate enactments. The title of the Chapter of the Trusts Act in which section 84 is included is also wide enough to admit of the extension, inasmuch as it does not deal with cases of trusts proper but of 'Certain obligations in the nature of trusts'.

We have, accordingly, come to the conclusion that in our future Report on the law of trusts, a recommendation should be made for amending section 84 to include the following proposition:

> "Where a person makes payment or delivery of property for any illegal purpose and such purpose is not carried into execution, or the person making the payment or delivering the property is not as guilty as the person receiving the payment or the property or the effect of permitting him to retain the money or property might be to defeat the provisions of, any law, he must restore the benefit to the person making the payment or delivery of the property".

Secs. 73-4. 101. No change is recommended in sections 73-74.

Sec. 124. 102. The definition of a contract of indemnity given in this section is not exhaustive. It deals with only one class of indemnity and defines only some of the rights belonging to an indemnity-holder of that particular class. The result has been that the Courts had to draw upon "the common law of India, which in this respect, is identical with that of England"[1]. In English Law, the word 'indemnity' is used in a sense wider than that indicated by the definition in section 124. It includes a promise to save the promisee from loss caused by events or accidents which do not or may not depend on the conduct of any person, or from liability arising from something done by the promisee at the request of the promiser. A right to indemnity may be created by express contract or by implied contract. In the latter case, the intention to create the right is based upon the true inference to be drawn from the facts. There is another class of cases where the law attaches a legal or equitable duty to indemnify in the particular set of circumstances. In such cases, the general principle of law is that 'when an act is done by one person

[1]Per Lord Wright in *Secretary of State* v. *The Bank of India*, A.I.R. 1938 P.C. 191 (192).

at the request of another, which act is not in itself manifestly tortious to the knowledge of the person doing it and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done'. This statement of the principle is a quotation from Mr. Cave's argument in *Dugdale* v. *Lovering*[1] which was approved by Lord Halsbury, L.C., in the case of *Sheffield Corporation* v. *Barclay*[2]. In that case Lord Davey observed:

> ".....Where a person invested with a statutory or common law duty of a ministerial character, is called upon to exercise that duty on the request, direction or demand of another, (it does not seem to me to matter which word you use), and without any default on his part acts in a manner which is apparently legal but is, in fact illegal and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request, or could not with reasonable diligence, have discovered it"[3].

In the same case, Lord Davey also said, "in some cases it is a question of fact whether the circumstances are such as to raise the implication of a contract for indemnity; but in cases like the one before your Lordships, when a person is requested to exercise a statutory duty for the person making the request, I think the contract ought to be implied"[4].

We think that this class of cases should be classified as quasi-contractual. With reference to the surety's claim in equity, Prof. Winfield remarked that 'that redress was given not only upon express promise of indemnity by the debtor, but also upon an implied obligation which would

[1](1875) L. R. C. P. 196.
[2](1905) A. C. 392.
[3]*Ibid.*, 399.
[4]*Ibid.*, 401.

nowadays be classified as quasi-contractual'[1]. The liability in such cases is based upon an assumed and fictitious request. In *Secretary of State* v. *The Bank of India Ltd.*[2], Lord Wright, in reference to the aforesaid statement of the law by Lord Davey, remarked, "It (the principle) is often, as in the statement by Lord Davey, said to be based on a contract implied by law, the request importing a promise to indemnify the other party against the consequences to him of acting upon the request. But in the words adopted by Lord Halsbury, it is said that the person is entitled merely to an indemnity. The fiction of a contract implied by law adds nothing, though it may seem to justify the Court in holding as a matter of law that the party is entitled to the indemnity on the basis that the assertion by the applicant of his request is the offer of a promise to indemnify if the other party acts upon that request to his damage".[2]

103. We recommend that the definition of the "Contract of indemnity" in section 124 be expanded to include cases of loss caused by events which may or may not depend upon the conduct of any person. It should also provide clearly that the promise may also be implied.

Further, a section[3] should be added in the Chapter on Quasi-Contracts covering cases where an obligation to indemnity may be implied in law.

Sec. 125.

104. This section deals only with the rights of the indemnified in the event of his being sued. The indemnified has other rights besides those mentioned in section 125. There is a sharp cleavage of opinion in the various High Courts as regards the remedies available to an indemnity-holder. While some High Courts, *e.g.*, Calcutta,[4] Madras,[5] Allahabad[6] and Patna[7] held that the indemnity-holder can compel the indemnifier to place him in a position to meet a liability without waiting until the indemnity-holder has actually discharged it or has suffered actual

[1]Winfield Law of Quasi-Contracts, 116, 117.
[2]A. I. R. 1938 P. C. 191 (193).
[3]*Vide* s. 72A, App. I.
[4]*Prafulla Kumar Basu* v. *Gopee Ballabh Sen*, I. L. R. [1944] 2 Cal. 318.
[5]*Ramaligna* v. *Unnamalai Achi*, 38 Mad. 791.
[6]*Abdul Majeed* v. *Abdul Rashid*, A. I. R. 1936 All. 598.
[7]*Chuni Bai Patel* v. *Nathu Bai Patel*, 22 Pat. 655.

loss, the Lahore High Court[1], the Judicial Commissioner of Nagpur[2] and the Bombay High Court[3] (in earlier cases) took the view that no right belongs to the indemnified until the loss occurs. So far as the Bombay High Court is concerned, Chagla J. (as he then was), clarified the position[4] and since then the Bombay High Court has also fallen in line with the Allahabad and Patna High Courts. We are of the opinion that the view expressed by Chagla J. is correct and should be adopted by the legislature. Under the English Common Law no action can be maintained until actual loss has been incurred. But in equity, if liability to pay has become absolute, the indemnified is entitled to maintain an action, even though actual loss has not yet resulted. It has been judicially recognised that adherence to English Common Law results in hardships and injustice and, indeed, the Courts of Equity in England have introduced the above mentioned rule to mitigate the rigour of the Common Law.

The decisions of the Court of Equity in England proceeded upon the principle that to indemnify does not merely mean to reimburse in respect of money paid, but, 'in accordance with its derivation', to save from loss in respect of the liability against which the indemnity has been given. These decisions have been followed in India by Judges who have taken a view consistent with the position in English Law described above.

The rights and remedies of the indemnity-holder in equity, have been thus described in Halsbury's Laws of England:

> ".....in equity, the rules of which now prevail in all Courts, even in the absence of such a special agreement, the person entitled to the indemnity may enforce his right as soon as his liability to the third party has arisen, and, therefore, he may obtain relief before he has actually suffered loss. He may, therefore, in an appropriate case, obtain an order compelling the promisor to set aside a fund out of which the liability may be met or to pay the amount due directly to the third party,

[1] *Sham Sundar* v. *Chandu Lal*, A.I.R. 1935 Lah. 974.
[2] *Ranganath* v. *Pachusao*, A. I. R. 1935 Nag. 117.
[3] *Shankar* v. *Laxman*, A.I.R. 1940 Bom. 302.
[4] *Gajanan Moreshwar* v. *Moreshwar Medan*, A.I.R. 1942 Bom. 302

or even, when the promisor is under no liability to the third party, as is the case in contracts of mere indemnity, to the promisee himself. Nor is the party indemnified precluded from obtaining relief by the fact that his liability to the third party cannot be effectively enforced against him"[1].

We recommend that on the basis of the position in English Law, as set out above, the rights of the indemnity-holder should be more fully defined[2] and the remedies of an indemnity-holder should be indicated even in cases where he has not been sued.

Secs. 126-129.

105. No change is considered necessary in sections 126 to 129.

Sec. 130.

106. There is divergence of opinion between some High Courts as to the right of the sureties to revoke surety bonds given to Courts. In *Bai Somi* v. *Chokshi*[3], which was a case of security for the guardian of a minor's estate, it was held that section 130 was inapplicable and that such a surety could not be discharged, as the very object of requiring security was to guarantee the minor's estate against the misconduct or mismanagement on the part of the guardian. In *Raj Narain* v. *Ful Kumari*,[4] a case under the Probate and Administration Act, the surety had made an application for his discharge on the ground that the Administrator had been guilty of waste which the surety could not prevent. It was held that it was open to the Court to grant the application. In *Subroya Chetti* v. *Ragammall*,[5] an application by the surety for an administrator for his discharge, was dismissed on the ground that no such maladministration had been proved. Thereupon the surety instituted a suit praying that the Court should discharge the plaintiff from his guarantees as a surety in regard to future transactions. The suit was dismissed upon the grounds that

(1) The making of an order for discharge might defeat the object for which an Administrator is required to find sureties to his administration bonds;

[1]Halsbury : Laws of England (2nd edn.), Vol. 16, 15.
[2]*Vide* s. 125A, App. I.
[3]19 Bom. 245.
[4]29 Cal. 68.
[5]28 Mad. 161.

(2) Section 130 does not apply to a special contract of suretyship; and

(3) If the section applies to an administration bond, the surety could, without any action or any legal proceeding put an end to his liability by giving notice to the Registrar or to the Court.

In *Kandhya Lal* v. *Manki*[1] the view of the Madras High Court was followed and it was held that where a person guarantees that an administrator will duly get in and administer the estate of a deceased person, there is a continuing guarantee within the meaning of section 129.

In our opinion the law has been correctly stated by Sulaiman, A.C.J., in *In goods of Dr. Abinash Chandra.*[2] It was held in that case that although it was true that the surety cannot claim as of right to be relieved of all liability by merely expressing his intention to do so either by notice or by a proper application to the Court and, although it is also true that the case of a surety whose security has been accepted by a Court, cannot be treated as one falling under sections 129 and 130 of the Contract Act so as to entitle him to put an end to the guarantee at his will, yet that is quite a different thing from saying that the High Court itself to which the guarantee is given has no power to exonerate the surety from all liability for future transactions. This view is in consonance with that of the Privy Council in *Mahomed Ali* v. *Howeson Bros.*[3] We recommend that an Exception be added to the section providing that a guarantee given to the Court cannot be revoked without the permission of the Court.

107. No change is considered necessary in sections 131 to 133. Secs. 131—133.

108. There was a conflict of authority upon the question whether a surety is discharged when a creditor allows his remedy against the principal-debtor to become barred by limitation. The Bombay, Calcutta and Madras High Courts took the view that the surety is not discharged; while the Allahabad High Court had taken a different view. In Sec. 134.

[1] 31 All. 56.
[2] A. I. R. 1932 All. 262.
[3] A. I. R. 1926 P. C. 110.

Mahanth Singh v. *U Ba Yi*,[1] the view of the majority of the High Courts was preferred. It was held that not every unenforceable contract was declared void, but only those 'unenforceable by law', and that those words meant not unenforceable by reason of some procedural regulation, but unenforceable by substantive law. A mere failure to sue within the time specified by the statute of limitation or an inability to sue by reason of the provisions of one of the Orders under Civil Procedure Code would not cause a contract to become void. It was observed that sections 134 and 139 were merely declaratory of the law in England.

We recommend that an Explanation be added to clarify this position and the view of the Privy Council be adopted.

109. There has been a difference of opinion between the Madras and the Nagpur High Courts as to the effect of Debt Relief Acts upon the liability of the surety. In cases where the creditor proves his debt but the debt is scaled down by the Board, the Madras High Court[2] has taken the view that the surety is liable only for the reduced amount, while the Nagpur High Court[3] has held that the surety remains liable for the whole of the original debt. In agreement with Pollock and Mulla[4], we prefer the opinion of the Madras High Court, which appears to be more in consonance with justice. This conflict, however, does not necessitate any change in the language of the section.

Secs. 135—140.

110. No change is considered necessary in sections 135 to 140.

Sec. 141.

111. This section limits the surety's right to the securities held by the creditor at the date of his becoming surety. According to the current English law "a surety has on payment and not before, a right to the benefit of all the securities, whether known to him or not at the time when he became surety, which the creditor has received from the principal-debtor, before, contemporaneously with, or after, the creation of the suretyship, and whether or not they existed at the time when the guarantee was given[5]".

[1]A. I. R. 1939 P. C. 110. The Allahabad High Court expressly overuled its earlier decisions to the contrary in *Aziz Ahmed* v. *Sher Ali*, A. I. R. 1956 All. 8 (F.B.)

[2]*Subramania* v. *Narayanaswami*, A. I. R. 1951 Mad. 48.

[3]*Balkrishna* v. *Atmaram*, A.I.R. 1944 Nag. 277.

[4]Pollock & Mulla : op. cit., 536.

[5]Halsbury : Laws of England (2nd edn.), Vol. 16, 92-93.

We think that the law upon this point should be brought in line with the English law.

112. The section does not lay down at what point of time the surety is entitled to have the creditor's securities made over to him wholly or in part, whether at the time when the debt of the creditor is paid off or when the surety pays the amount of his guarantee. There is a difference between the Bombay and Madras High Courts on this point. In *Goverdhandas* v. *The Bank of Bengal*[1], a surety had guaranteed an aliquotor a defined portion of past debt secured by mortgage. On payment by him of the portion of the debt guaranteed by him, he claimed to be entitled to share in the mortgage in proportion to the amount of the debt which he had guaranteed and paid before the mortgagee had been paid the full amount of his mortgage debt. This claim was rejected. In *Parvatanem Bhushayya* v. *Suryanarayana*[2], the Madras High Court doubted the correctness of this view. That Court decided that the surety was entitled to a proportionate share in a security held by the creditor at the time the surety discharged his liability even though the creditor was not fully paid. Pollock and Mulla[3] opined that the view taken by the Madras High Court is inequitable and that the creditor's right to hold securities until the whole debt has been paid is paramount to any claim of the surety whether based upon section 140 or section 141. We agree with the opinion of the learned Commentators and recommend that it should be made clear that the surety is entitled to have the creditor's securities made over to him only when the creditor is fully paid off.

113. We think that a comma should be inserted after the word 'misrepresentation', and the existing comma after the word 'creditor' removed, in order clearly to bring out that the section deals with the case of a guarantee obtained by means of misrepresentation whether the same is brought by the creditor or by some one else, with his knowledge and assent. Sec. 142.

114. It has been held[4] that this section provides for the case of a guarantee obtained by wilful silence as distinguished from mere non-disclosure. The language of the Sec. 143.

[1] 15 Bom. 48.
[2] A. I. R. 1944 Mad. 195.
[3] Pollock & Mulla : op. cit., 551.
[4] *Balkrishna* v. *Bank of Bengal*, 15 Bom. 585 (591).

section should be brought into conformity with the judicial opinion.

Sec. 144. 115. No change is necessary in section 144.

Sec. 145. 116. Pollock and Mulla[1] suggest that the words 'rightfully' and 'wrongfully' are not felicitous and that they should be substituted by the words 'reasonably' and 'unreasonably'. We do not agree. 'Rightfully' was intended to convey that the sums paid were such as the creditor was legally entitled to recover and, therefore, the surety had the right to pay, and, likewise, the expression 'wrongfully' was intended to convey that the sums paid were such as the creditor was legally not entitled to recover, and, therefore, the surety was wrong in paying the same. We feel that the expressions used by the legislature more fully convey the intended idea than the suggested expression.

117. Controversy has arisen on the question whether a surety paying a debt which is barred by limitation as against the debtor can be said to have paid it 'rightfully' within the meaning of this section. We think the affirmative is the correct answer as the rights of the surety arise not from the liability of the debtor but from the discharge of his own liability. An Explanation should be added to the section to make this clear.

118. In appropriate cases the surety is entitled to recover special damages beyond the sum he has actually been compelled to pay. It has been observed[2] that his right is not merely a right to stand in the shoes of the creditor but is founded upon an independent equity.

An Explanation should be added to the section to clearly preserve this right.

Secs. 146-7. 119. No change is recommended in sections 146 to 147.

Sec. 148. 120. A contract of bailment may be implied in fact or in law.

[1]Pollock & Mulla : op. cit., 556.
[2]*Per* Stirling J. in *Bedeley* v. *Consolidated Bank*, (1886) 34 Ch. D. 556 (566).

In *Queen* v. *McDonald*[1], Lord Coleridge, C.J. observed:

> "It is not correct as it appears to me, to use the expression "contract of bailment" in a sense which implies that every bailment must necessarily in itself be a contract. I do not so understand the definition of the term "bailment". It is perfectly true that in almost all cases a contract either express or implied by low accompanies a bailment, but it seems to me that there may be a complete bailment without the contract. According to all the definitions, as for instance, those given in Sir William Jones, Blackstone & Kent's Commentaries, it would appear that a bailment consists in the delivery of an article upon a condition or trust. It is true, I know, that the authors of those various definitions go on to say that there is a promise or contract to restore the goods, but this is not, as it seems to me, the bailment itself, but "a contract that arises out of it".

The American Law also recognises a contract of bailment by implication of law. The law is thus stated in American Jurisprudence: "It has previously been observed that an actual contract or one implied in fact is not always necessary to create a bailment; that such a contract may be implied in law as well as in fact. Where, otherwise than by a mutual contract of bailment, one person has lawfully acquired the possession of personal property of another and holds it under circumstances whereby he ought, upon principles of justice, to keep it safely and restore it or deliver it to the owner, for example, where possession has been acquired accidentally, fortuitously, through mistake, by an agreement since terminated, or for some other purpose, such person and the owner of the property are, by operation of law, generally treated as bailee and bailor under a contract of bailment, irrespective of whether or not there has been any mutual assent, express or implied, for such relationship. Such quasi-contracts of bailment include what are known as constructive and involuntary bailments".[2]

[1] 13 Q. B. 323 (326-327).
[2] 6 Am. Jur. (Rev. ed.), Bailments, S. 86.

In our opinion, the present definition of bailment should not be altered. But the case of what has been described as quasi-contract of bailment should be provided for in a separate section stating that the bailor and bailee in such cases must, so far as may be, perform the same duties, and be subject to the same liabilities and disabilities as if they were bailors and bailees under a contract express or implied as provided in section 148.[1]

Sec. 149. 121. The Reserve Bank of India has recommended that the following words be added to section 149: "And the delivery of 'documents of title' to goods by the owner or with consent of the owner shall be deemed to have such effect." We have discussed the relation of section 149 to 'documents of title' in our note on section 178, infra. The suggestion is an obvious corollary to the true nature of 'documents of title'. We accept the suggestion and recommend that an Explanation be added to section 149 to give effect to the suggested addition.

Sec. 150. 122. No change is necessary in section 150.

Sec. 151. 123. This section embodies the common law rule as to the liability of bailees other than common carriers and innkeepers. Common carriers and innkeepers were liable as insurers of goods; i.e., they were responsible for every injury to the goods occasioned by any means, except only the act of God and of the King's enemies. The English Common Law with regard to common carriers was partly incorporated in the Carriers Act, 1865. According to the Privy Council[2] the responsibility of a common carrier is not within the Contract Act and is governed by the Carriers Act, 1865, and the common law of England.

Carriers by sea for hire are not common carriers within the meaning of the Carriers Act. There is a conflict of authority as to the responsibility of such carriers being governed by the Common Law of England or by sections 151 and 152. The Calcutta High Court, in *Mac Killican* v. *The Compagnie Des Messageris Maritimes des France*,[3] held that a foreign carrier is not a commercial carrier and that if the contract of affreightment is made in India, the liability would be governed by the provisions of sections

[1] *Vide* s. 181A, App. I.
[2] *Irrawaddy Flotilla Co.* v. *Bugwandass*, 18 I.A. 121 (129).
[3] I.L.R. 6 Cal. 227.

150 and 151. The Madras High Court[1] has held that the liability was that of common carriers according to the Common Law of England. The correct view would appear to be that the proper law of Contract of affreightment is the law by which the parties intended that their contract should be governed.

We do not, however, make any recommendation with regard to the law of carriers in this part of our report, as we propose to deal with that subject separately.

124. The liability of an innkeeper should be governed by sections 151 and 152. The view of the Allahabad High Court in *Jain & Son* v. *Cameron*[2] should, in our opinion, be preferred to the view of the Bombay High Court in *Whateley* v. *Palanji*.[3] We do not think that it is necessary to make any change in the sections on this account, as we feel that the Courts are not likely to take a view contrary to the decision of the Allahabad High Court on this point.

125. Whether a bailee can contract himself out of the liability imposed by section 151 has been the subject of controversy in Courts. *In Sheikh Mahamad Ravuther* v. *The British India Steam Navigation Co. Ltd.*[4], Sankaran Nair, J. held (contrary to the views of the other two judges—White C. J., and Wallace J.) that a contract by a bailee purporting to exempt himself wholly from liability for negligence was not valid. This view was founded on the fact that while there are express provisions for contracting out in a number of other sections e.g., Ss. 152, 163, 165, 170, 171 and 174 there is no such provision in S. 151. This view did not find favour even in later cases in the Madras High Court[5] nor was it ever followed in Bombay[6]. Indeed Beaumont C. J. of the Bombay High Court thought that it would be a startling thing that persons *sui juris* are not at liberty to enter into such a contract of bailment as they may think fit. He relied on the absence of an express provision in the Act

[1]See *Hajee Ismail Sait* v. *The Company of the Messageries Maritimes of France*, 28 Mad. 400; *Kumber v. British India Steom Navigation Co. Ltd.*, 38 Mad. 941.

[2]I.L.R. 44 All. 735.

[3](1866) 3 B.H.C. (O.C.) 137.

[4]I.L.R. 32 Mad. 95.

[5]*Home Insurance Co.* v. *Ramnath Co.*, A.I.R. 1955 Mad. 602.

[6]*The Bombay Steam Navigation Co. Ltd.* v. *Vasudev*, 52 Bom. 37; *Lakhaji Dollaji* v. *Boorugu*, A I. R. 1939 Bom. 101.

prohibiting a party from contracting out of section 151. We accept the majority view as correct. In order to resolve this controversy we recommend that the words 'in the absence of any special contract' be added in section 151.

Secs. 152-8. 126. No change is necessary in sections 152 to 158.

Sec. 159. 127. Pollock and Mulla[1] put the query whether an express contract not to recall a thing gratuitously lent before the expiration of a certain time would not be valid. We think that section 159 is no bar to such a contract. It is not necessary to alter the language of this section.

Sec. 160. 128. This section does not provide for the bailor's remedies if the goods are not forthcoming. He has the remedy for damages against the bailee and also the equitable remedy to follow the proceeds of a sale by the bailee where they can be distinguished either being actually kept separate or being mixed up with other moneys[2].

We consider that a provision should be made for the remedies of the bailor apart from his rights under the existing section by adding a new sub-section.

Secs. 161-170. 129. No change is recommended in sections 161 to 170.

Sec. 171. 130. It has been suggested that share and stock-brokers should be included in the list of lien-holders. But the suggestion is not warranted by commercial usage and no inconvenience seems to have been caused by the absence of share and stock-brokers from the list of lien-holders given in this section. Moreover, there is a saving provision by which a lien might be created by an express contract. We cannot accept the suggestion.

Sec. 172-7. 131. No change is recommended in sections 172 to 177.

Sec. 178. 132. In relation to this section the Law Ministry has posed the question whether an owner of goods who is in possession of documents of title to goods can create a valid pledge by delivery of the said documents.

[1]Pollock & Mulla : op. cit., 585.
[2]*Per* Jessel M.R. in Re *Hallett's Estate*, (1879) 13 Ch. D. 696 (710).

The difficulty has been created by reason of the amendment of this section in 1930. Before the amendment, "a person who is in possession of any goods or of any document of title to goods" could validly effect a pledge by pledging such documents. This was the view taken of the section by the Judicial Committee in *Official Assignee of Madras* v. *Mercantile Bank of India*[1]. The words quoted above were omitted in 1930 and the section as it now stands seems to confer only on a mercantile agent the right to effect a pledge by mere delivery of documents of title. It has been pointed out by Pollock and Mulla[2] that this is a lacuna in the Act and it leads to the situation that what a mercantile agent could do, the owner cannot. Referring to this amended section, the Judicial Committee in the aforesaid case, also observed that the legislature when it made the amendment in 1930 did not appreciate fully the effect of the actual words of the amended section.

It may be possible to argue that notwithstanding the amendment of the section 1930 the owner's rights to effect a pledge of the goods by mere delivery of documents of title is not taken away. We think it is necessary to remove any uncertainty that may exist on the point. We have, therefore, recommended the addition of the Explanation to section 149, to the effect that the delivery of documents of title to any goods by the owner or by a person in possession of the documents with his consent, should be treated as delivery of possession with the meaning of section 149. We have further added a sub-section in section 178, restoring the law as it stood before 1930 and also retaining the existing section.

We further recommend that the definitions of 'documents of title' and 'mercantile agent' be put in section 2 and be not limited to the purposes of section 178.

133. No change is necessary in sections 179 and 180. Secs. 179-180.

134. The words 'such suit' in section 181 are somewhat vague. It should be made clear that they refer to such suit as is referred to in section 180. Sec. 181.

[1] I.L.R. 58 Mad. 181 (P.C.)

[2] Pollock & Mulla, Op. cit., 606.

Sec. 182.

135. The definition in section 182 is not exhaustive. It has to be read with section 186 which says that the authority of an agent may be express or implied.

136. In *Sukumari Gupta* v. *Dhirendranath*,[1] Pal, J. took the view that the definition in section 182 seemed to be somewhat wider than that of English Law, inasmuch as the definition does not require that the employment should be by the principal himself. The soundness of this view has been doubted by Pollock and Mulla[2].

The questions raised in this and the preceding paragraphs would be solved if we combine sections 182 and 186, and we recommend accordingly.

Sec. 183.

137. Section 183 appears to be too narrow. It is confined to natural persons and would exclude corporations. Further, like section 182, it contemplates only an express appointment by the principal. We propose that the marginal note to section 183 be altered to read: 'Capacity to act as principal' and the section be amended to provide that the capacity to contract or do any other act by means of an agent is co-extensive with the capacity of the principal to make the contract or do the act which he is authorised to make or do. It would then be clear that in the case of a corporation an act beyond the scope of its memorandum of association will be beyond its capacity.

Sec. 184.

138. Section 184 permits a minor (as well as a person of unsound mind) to become an agent as between the principal and third persons without being responsible to his principal. There may be cases where an agent may incur a personal liability upon the contract towards third persons. But in our opinion an agent who is a minor or a person of unsound mind should be exonerated from such liability. According to Bowstead,[3] the personal liability of the agent upon the contract of agency and upon any contract entered into by him with any third person is dependent on his capacity to contract on his own behalf. We agree with this view and recommend that section 184 should be modified accordingly.

[1] A. I. R. 1941 Cal. 643.

[2] Pollock & Mulla: Op. cit., 619.

[3] Bowstead : Op. cit. (11th Edn.), 15.

139. No change is necessary in section 185. Sec. 185.

140. Section 186 becomes superfluous in view of the change proposed by us in section 182. Sec. 186.

Section 186 should, therefore, be omitted.

141. Section 187 not only defines 'implied authority' but also attempts to lay down what would be the nature of the circumstances from which an authority may be implied. The statement as regards the nature of circumstances is not and does not purport to be exhaustive. It omits to specify equally important cases in which authority may be implied and does not fully make provision for the circumstances which can lead to an inference in favour of 'authority'. For example, this section does not convey the idea of agency of necessity. Bowstead's observation namely, that 'agency can be implied from the conduct or situation of the parties or from the necessity of the case', is more comprehensive. We are of the opinion that this section needs alteration so that 'situation of the parties and the necessity of the case", may also be specified as circumstances from which an authority may be implied, making it clear that some antecedent relationship must exist between the parties to justify an implication of agency. Sec. 187.

142. Section 189 provides for a case where there is an already existing relationship of principal and agent and the authority of the agent is implied from the existence of a necessity. The section is not concerned with the case where relationship of principal and agent is itself created by reason of the existence of necessity. The English Law on the subject may be stated as follows:

> "Agency of necessity arises wherever a duty is imposed upon a person to act on behalf of another apart from contract, and in circumstances of emergency, in order to prevent irreparable injury. It may also arise where a person carries out the legal or moral duties of another in the absence or default of that other, or acts in his interest to preserve his property from destruction. The doctrine of agency of necessity has a limited application and, apart from cases where a person carries out the legal or moral

[1] Bowstead : Op. cit. (11th edn.), 5.

duty of another, is probably confined to circumstances in which there is a contractual relationship of some kind, express or implied, in existence already".[1]

An example of such contractual relationship is that of a carrier. The result of the modification we have suggested will be that apart from the case where there is an existing relationship of principal and agent, the law will specifically provide for the creation of such agency from the very existence of emergency or necessity.

143. A new section may be added after section 187 providing for 'acts which may be done by means of an agent'. In English law, an agent may be appointed for the purpose of entering into any contract for doing any act on behalf of the principal which the principal might himself make or do, except for the purpose of exercising a power or authority or performing a duty imposed on the principal personally, the exercise or performance of which requires discretion or skill or for the purpose of doing an act which the principal is required to do by or pursuant to a statute in his own person. We think that the omission in our Contract Act of a provision as to the acts which may be done by means of an agent should be supplied.[2]

Sec. 188.

144. Section 188 is divided into two parts. The first deals with 'authority to do an act', that is, acts in general, and the other deals with the authority to carry on business—an activity consisting of particular kinds of acts. The first part omits to say that the authority of an agent includes the authority to do things which are ordinarily incidental to the performance of the act expressly authorised. In other words, the extent of the authority is confined to doing things necessary for the performance of the act expressly authorised. In our opinion, the first part of the section should be simplified and the omission mentioned above should be supplied.

145. In our opinion, the second part of the section may be modified[3] to the following effect: Every agent has implied authority to act, in the execution of his express authority, according to the usage and custom prevailing in the market or in the business in which he is employed.

[1] Halsbury, 3rd Ed., Vol. I, ¶157.
[2] *Vide* s. 187A, App. I.
[3] *Vide* s. 188(2), App. I.

146. No change is necessary in section 189. Sec. 189

147. The law on the subject of delegation may be stated as follows: Sec. 190.

An agent cannot delegate his powers or duties without the express or implied authority of the principal. Nor can there be any delegation where personal confidence is reposed or personal skill required in the execution of the work so that it can be said that the agent has expressly or impliedly undertaken to perform the acts personally.

Briefly stated, the exceptions to the above rule are:

(i) Where the employment of a sub-agent is justified by usage of the particular trade or business in which the agent is employed, provided such a usage is neither unreasonable, nor inconsistent with the express terms of the agent's authority;

(ii) Where in the course of the agent's employment unforeseen emergencies arise which render it necessary to delegate his authority;

(iii) Where the authority conferred is of such a nature as to necessitate its execution wholly or in part by means of a sub-agent;

(iv) Where the act done is purely ministerial and does not involve confidence or discretion.[1]

Exception No. (ii) as stated above, is already covered by section 189. The remaining exceptions should be incorporated in the section.

148. No change is considered necessary in sections 191-193. Secs. 191-3.

149. Section 194 deals with the case of a 'substitute' as distinguished from the case of a sub-agent. Pollock and Mulla[2] think that the language of the section is perhaps not the most appropriate. We agree and recommend that the word 'name' may be changed to 'appoint'. Sec. 194.

150. No change is recommended in section 195. Sec. 195.

151. As regards the provision relating to ratification in section 196, we think that the proposition laid down by Sec. 196.

[1] See Halsbury : Op. cit., (3rd edn.), Vol. I, 169-170; Bowstead : Op. cit., (11th edn.), 69.

[2] Pollock & Mulla : Op. cit., 641.

Bowstead[1] should be added to the section, namely, that for the purpose of ratification it is immaterial whether the person doing the act was an agent exceeding his authority, or was a person having no authority at all.

Sec. 197. 152. No change is necessary in section 197.

Sec. 198. 153. Section 198 should be subjected to an exception, namely, 'unless he intends to ratify the act, and take the risk, whatever the circumstances may have been'.[2]

154. For the purpose of ratification it is not necessary that the principal should have knowledge of the legal effect of the act or of collateral circumstances affecting the nature thereof.[3] In order to make the position clear this principle may be embodied in section 198 by way of an Explanation or otherwise.

Sec. 199. 155. No change is necesary in section 199.

Sec. 200. 156. The ratification of a contract does not give the person who ratifies it a right of action in respect of any breach thereof committed before the time of the ratification.[4] This proposition may be incorporated in a separate section.[5]

Sec. 201. 157. There is a conflict of authority on the question as to when the business of the agency of a sale of goods is completed, *i.e.*, whether on payment to the principal of the price realised by the agent or on completion of the sale and receipt of price by the agent. The Allahabad[6] and Calcutta[7] High Courts take the former view while the Madras High Court[8] has taken the latter view. We are of the opinion that the view taken by the Madras High Court represents the law correctly and we consider that agency is determined when the agent ceases to represent the principal, though his liability in respect of acts done by him or by his agents continues. Under the English Law, the agent becomes *functus officio*[9] on the completion of the contract

[1] Bowstead on Agency, 1951 Ed., p. 33.
[2] Bowstead : Op. cit., (11th edn.), 39.
[3] *Ibid.*
[4] *Ibid.* 43.
[5] *Vide* s. 200A of App. I.
[6] *Babu Ram* v. *Ram Dayal*, 12 All. 541 (545).
[7] *Fink* v. *Buldeodas*, 26 Cal. 715 (725).
[8] *Venkatachalam* v. *Narayanan*, 39 Mad. 376 (378-379).
[9] *Blackburn* v. *Sholes*, 11 R.R. 723, cited in Bowstead : Op. cit. (11th edn.), 286

of sale. That this was the intention of the legislature appears to us to be clear from the heading of the sub-chapter in which the section occurs, which is 'revocation of authority'. We do not, accordingly, consider any legislative change to be necessary.

158. This section is not, however, exhaustive of the cases when the authority of an agent is determined and agency is terminated. The following should also be included in the section as circumstances in which the authority of an agent is determined:[1]

(1) Destruction of the subject-matter of the agency;[2]

(2) The happening of any event rendering the agency unlawful or upon the happening of which it is agreed between the principal and agent that the authority shall determine;

(3) Insolvency of agent;

(4) Dissolution of the firm, corporation or company where the principal is a firm, corporation or registered company.

There are good reasons for providing for termination of agency on the agent becoming an insolvent. The credit in the market of a person who is adjudicated insolvent is affected and in many cases such an agent is not in a position to fulfill the object of the contract of agency. Under the Insolvency law where a commission agent has sold the goods and realised the money, such money, on his adjudication as insolvent, is not treated as trust money and it goes to the Official Assignee or Receiver.[3]

159. No change is necessary in sections 202-3. Secs. 202-3.

160. In section 204, the language 'such acts and obligations as arise from acts already done in the agency' is not happy. The illustrations point to the conclusion that the intention of the legislature was to protect acts already done and obligations arising from such acts. We suggest that the language of the section should be made more explicit. Sec. 204.

161. No change is necessary in section 205. Sec. 205.

[1] Bowstead : Op. cit. (11th Ed.), 286-7.

[2] *Rhodes* v. *Forwood*, (1876) 1 App. Cas. 256.

[3] Mulla : The Law of Insolvency in India (2nd edn.), 465.

Sec. 206.

162. The language of section 206 has been commented upon by Rankin C.J. in *In re Shaw Wallace & Co.*[1] in the following words:

> "If the phrase 'such revocation or renunciation' is to be taken as referring back to section 205 I confess that I find no meaning in the section; and it is at least arguable that what the draftsman meant to say is that when there is no express or implied contract that the agency should continue for any fixed period reasonable notice must be given of the revocation or renunciation of the agency."

We think that this criticism should be obviated by making it clear that the section is applicable only where the period of the agency is not fixed by contract, express or implied.

Secs. 207—210.

163. No change is considered necessary in sections 207 to 210.

Sec. 211.

164. It is not the duty of an agent to adhere to instructions which are not lawful. This should be made clear in section 211.

165. According to this section the agent is liable to account for profits when they accrue during the breach of the duty enjoined by this section. There is no provision for accounting of profits in cases where without the breach of such duty the agent make profits. A section[2] should be added providing that if an agent, without the knowledge of the principal, acquires any profit or benefit from his agency other than that contemplated by the principal at the time of making the contract of agency, he must pay such profits and the value of such benefits to the principal[3]. In case such benefits consist of a bribe or a secret commission the agent is liable to summary dismissal and to pay to the principal loss actually sustained in consequence of any breach of duty on the agent's part induced by the bribe or secret commission, in addition to the forfeiture of the commission or remuneration to which he may have been otherwise entitled. It is desirable to make the necessary additions.[4]

[1] A. I. R. 1931 Cal. 676 (678).
[2] S. 218A, App. I.
[3] Bowstead, 11th Ed., 75.
[4] S. 216A, and Expl. to s. 220, App. I.

166. This section demands a higher standard of skill than the English or American law. According to the section an agent, whether gratuitous or for reward, is bound to possess skill generally possessed by persons engaged in similar business and is bound to use such skill as he possesses. In England, a distinction is drawn between the gratuitous agent and an agent for reward. The former is bound to use only such skill as he has, while a higher standard is exacted in the case of the latter. In the case of an agent for reward the skill required is not merely that which he in fact possesses, but such as is reasonably necessary for the due performance of his undertaking or such as is usual for the ordinary or proper conduct of the business in which he is employed.[1] In America, the law has been stated as follows: Sec. 212

> '(1) Unless otherwise agreed, a paid agent is subject to a duty to the principal to act with standard care and with the skill which is standard in the locality for the kind of work which he is employed to perform and, in addition, to exercise, any special skill that he has.
>
> (2) Unless otherwise agreed, a gratuitous agent is under a duty to the principal to act with the care and skill which is required of persons not agents performing similar gratuitous undertakings for others.'

No injustice, however, appears to have been experienced by maintaining the higher standard in India and we propose to leave the section unaltered.

167. No change is recommended in sections 213-214. Secs. 213-4.

168. Two conditions—in the alternative—are annexed to the right of the principal to repudiate the transaction where the circumstances mentioned in the section exist. They are (1) dishonest concealment of a material fact; and (2) dealing being disadvantageous to the principal. The English rule does not recognise these conditions. We are of the view that the logical conclusion of the fiduciary character of the relationship of the principal and agent, is that for the exercise of the right of repudiation it should Sec. 215.

[1] Halsbury : Op. cit. (3rd edn.), Vol. 1, 185.

be sufficient for the principal to prove that his consent had not been obtained and that the agent had not acquainted him with all material circumstances. It should not be further necessary to establish that there was a dishonest concealment on the part of the agent or that the dealings were disadvantageous to the principal. The English rule is founded upon the principle that the agent will not be allowed to put his duty in conflict with his interest and, therefore, he must not enter into any transaction which is likely to produce that result, unless he has first made the fullest disclosure of the exact nature of his interest to his principal and the principal has assented. If there is no disclosure, the fairness of the transaction is immaterial and it is avoidable at the principal's option[1]. In the *Bank of Upper Canada* v. *Bradshaw*[2], Lord Cairns observed: "Their Lordships are desirous in no way to qualify or to abridge the doctrine of law prevailing in almost all systems of jurisprudence, that any one standing in the position of an agent cannot be allowed to put his duty in conflict with his interests, and they are certainly not prepared to rest the application of the doctrine on the amount of the interest, adverse to that of his employer, which the agent may be supposed to have."

In America the law is stated substantially in the following terms:

> 'An agent, in dealing with the principal on his own account in regard to a subject-matter as to which he is employed, is subject to a duty to deal fairly with the principal and to communicate to him all material facts in connection with the transaction of which he has notice, unless the principal has manifested that he knows such facts or that he does not care to know of them[3].'

The removal of the two conditions mentioned above from section 215 will be in consonance with the provisions of section 88 of the Trusts Act. We recommend accordingly.

Secs. 216-9. 169. No change is recommended in sections 216—219.

[1] Halsbury: Op. cit. (3rd edn.), Vol. 1, 190, 191.

[2] (1867) L. R. 1 P.C. 479 (489).

[3] American Resta ement of the Law of Agency, sec. 390.

170. An agent is not entitled to any remuneration in respect of any transaction which is obviously, or to his knowledge, unlawful nor is he entitled to remuneration in respect of any transaction entered into by him in violation of the duties arising from the fiduciary character of the relationship between him and the principal, even if the transaction be adopted by the principal. Bowstead appends an illustration: 'An agent, who is employed to sell certain land sells it to a company in which he is a director and a large shareholder. He is not entitled to commission upon the sale, even if it be adopted and confirmed by the principal[1]'. Sec. 220.

We think that the Act should have specific provision[2] with regard to the non-liability of the principal to pay the remuneration in the cases stated above.

171. No change is considered necessary in sections 221 to 228. Sec. 221-8.

172. The rule embodied in section 229 does not apply where the agent has taken part in the commission of a fraud on the principal, unless the fraud is committed not against the principal, but against a third person[3]. This exception should be made a part of the section. Sec. 229.

173. It is well established that when an agent has made a contract in the subject-matter of which he has a special property, he may, even though he contracted for an avowed principal, sue in his own name. The exception may be added[4]. Sec. 230.

174. It is also established[5] that an agent may in his own name sue for the recovery of money paid on his principal's behalf under a mistake of fact, or in respect of a consideration which fails or in consequence of the fraud or other wrongful act of the employee, or otherwise under circumstances rendering the payee liable to repay the money. This rule should also be added[6].

[1] Bowstead: Op. cit. (11th edn.), 137 [Art. 68(b), *Ill.* 4.]
[2] *Vide* Expl. to s. 220, App. I.
[3] Bowstead : Op. cit. (11th Edn.), 232.
[4] 2 Sm. L. C. 378, cited in Pollock & Mulla, Op. cit., 700.
[5] Pollock & Mulla : Op. cit., 700, 701.
[6] *Vide* s. 230A, App. I.

Secs. 231-2. 175. Sections 231 and 232 overlap. Marriot, J., in the case of *Premji Trikamdas* v. *Madhowji Munji*[1] took the view that section 232 was not a repetition of the first part of section 231 and that it was a qualification of the first portion of paragraph 1 of section 231, which gives a principal a general right to enforce a contract entered into by his agent. According to the learned Judge, section 232 qualifies that general right by making it subject to the rights and obligations subsisting between the agent and the other contracting party. Pollock and Mulla[2] express their inability to discover any difference between the first paragraph of section 231 and section 232. According to them the case is one of inadverence. We agree with the learned commentators, and recommend that section 232, being covered by the provision in section 231, be omitted.

Sec. 233. 176. According to English Law, in cases contemplated by section 233, the liability of the principal and agent would be alternative and not joint[3]. There is a difference of opinion as to whether the section marks a departure from English Law. Coutts Trotter, C. J. in *Kutti Krishna Nair* v. *Appa Nair*[4], held that the English law was intended to be reproduced in the section and that the third party may sue both the agent and the principal alternatively or he can sue any one of them but he cannot sue both of them jointly. On the other hand, the Bombay[5] High Court and, in a later case, the Madras High Court[6] took the contrary view that the section created a joint liability. We think that the section deals with substantive rights and not procedural remedies, and that the latter view is correct. Further, we recommend that a provision be made that a judgment against the principal or the agent, although unsatisfied is, so long as it subsists, a bar to any proceedings against the agent or the principal, as the case may be.

177. We recommend that the English rule that where inquiry or loss is caused to a third person by the wrongful act or omission of an agent who is acting within the scope

[1] 4. Bom. 447.
[2] Poollock & Mulla: Op. cit. 708.
[3] Bowstead: op. cit. (11th edn.), 202.
[4] 49 Mad. 900.
[5] *Shiv Lal* v. *Birdichand*, 19 Bom. L.R. 39.
[6] *Shamsuddin* v. *Shaw Wallace & Co.*, A.I.R. 1939 Mad. 520(523).

of his authority, the principal is liable jointly and severally with the agent, should be expressly provided for[1].

178. It is well established that in cases where the property of the principal is disposed of by an agent in a manner not expressly or ostensibly authorised, the principal is entitled, as against the agent and third persons, subject to any enactment to the contrary, to recover the property wheresoever it may be found[2]. This rule should be adopted, together with its exceptions[3].

179. No change is recommended in sections 234—237. Secs. 234-7.

180. The rule that agency can be created by estoppel should be incorporated in a new section[4]. That rule may be stated thus: Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of such representation, to the same extent as if such other person had the authority which he was so represented to have.

181. No change is considered necessary in section 238. Sec. 238.

182. With a view to presenting a clear picture of the recommendations made by us in this Report we have made alterations giving effect to them in the text of the existing Act, as shown in Appendix I.

Appendix II contains the suggestions made by us in respect of other Acts.

183. While in Appendix I the changes proposed are shown in the form of draft amendments to the existing sections, we would like to make it clear that it should not be treated as a draft Amendment Bill. It will

[1] *Vide* s. 238A, App. I.
[2] Halsbury, 3rd Ed., Vol. I, 211; Vol. 14, 628-9.
[3] *Vide* s. 238B, App. I.
[4] *Vide* s. 237A, App. I.

be for the official draftsman to draw up such a bill after renumbering the Chapters and the sections of the Act as has become necessary by reason of the changes which have taken place in the text of the Act since 1872.

M. C. SETALVAD

(*Chairman*).

M. C. CHAGLA,
K. N. WANCHOO,
P. SATYANARAYANA RAO,
N. C. SEN GUPTA,
V. K. T. CHARI,*
D. NARASA RAJU,
S. M. SIKRI,*
G. S. PATHAK,
G. N. JOSHI,
N. A. PALKHIVALA.

K. SRINIVASAN,
DURGA DAS BASU,
Joint Secretaries.

NEW DELHI:
The 26th September, 1958.

*Besides Dr. Sen Gupta, Shri Narasa Raju and Shri Pathak, who are mentioned in the forwarding letter Shri Chari and Shri Sikri have also authorised the Chairman to sign the Report on their behalf.

APPENDIX I

Proposals as shown in the form of draft amendments.

[This is not, however, to be treated as a draft Bill.]

Changes in the text of the existing Act have been shown in italics, wherever possible.

Section 1. In section 1 of the Indian Contract Act, 1872 (hereinafter referred to as the principal Act),—

(a) the word "Indian" shall be omitted;

(b) after the words "any incident of any contract", the words "*if such usage, custom or incident of contract is*" shall be inserted.

Section 2. In section 2 of the principal Act, after clause (j), the following clause shall be added, namely:—

"(*k*) *The expressions "documents of title" and "mercantile agent" have the meanings respectively assigned to them in the Indian Sale of Goods Act*, 1930".

Section 8. Section 8 of the principal Act shall be renumbered as sub-section (1) thereof, and after sub-section (1) as so renumbered, the following sub-section shall be inserted, namely.—

"(2) *In the case of a promise made in consideration of the promisee's performing an act, the promisee's entering upon the performance of the act is an acceptance of the proposal, unless the promise contains an express or implied term that it can be revoked before the act has been completed*".

Section 9. Section 9 of the principal Act shall be renumbered as sub-section (2) of that section, and the following sub-section shall be inserted as sub-section (1) thereof, namely:—

"(1) *A promise may be express or implied*".

Section 15. For section 15 of the principal Act, the following section shall be substituted, namely:—

"15. *Coercion defined.*

Coercion is the committing, or threatening to commit, any act, *when the committing, or threatening to commit, such act is punishable by any*

law for the time being in force, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

Explanation.—Where the coercion is employed in a place situated outside the territories to which this Act extends, it is immaterial whether *the law* is or is not in force in that place."

Section 19. For section 19 of the principal Act, the following section shall be substituted, namely:—

"19. *Voidability of agreements without free consent.*

(1) When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

(2) A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, *claim* that the contract shall be performed and that he shall be put in the position in which he would have been if the representations made had been true. *Where such a claim is made, the court shall, in deciding thereon, have due regard to the following considerations—*

(a) *whether, and if so, how far, the claim is reasonable; and*

(b) *whether it is in the power of the party against whom the contract is voidable to perform it fully.*

(3) Where such a claim is disallowed, the court may award compensation in money for the injury caused by the fraud or misrepresentation.

Exception.—If such consent was caused by misrepresentation, or by silence fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation.—A fraud or misrepresentation which did not cause the consent to a contract of the party on whom

such fraud was practised, or to whom such misrepresentation was made, does not render a contract voidable."

Section 23A. (New).

After section 23 of the principal Act, the following section shall be inserted, namely:—

"23A. *Agreements to procure marriage or pay money in consideration thereof.*

The following agreements are unlawful within the meaning of section 23—

(a) *an agreement to procure the marriage of any person for reward;*

(b) *an agreement to pay money or deliver anything whose value can be expressed in terms of money to a parent or other guardian-in-marriage of any person in consideration of his consenting to the marriage of that person.*"

Section 24.

To section 24 of the principal Act, the following Explanation shall be added, namely:—

"*Explanation.—Where—*

(a) *there are distinct promises based on distinct considerations, and*

(b) *some of the promises are unlawful and can be separated from the promises that are lawful, or some of the considerations are unlawful and can be separated from the considerations that are lawful,*

the agreement is void to the extent of the promises which are unlawful or are based on unlawful consideration."

Section 25.

In section 25 of the principal Act,—

(a) in clause (3), the words "*or unless*" shall be inserted at the end;

(b) after clause (3), the following clauses shall be inserted, namely:—

"(4) *it is a promise, express or implied, which the promisor knew or should reasonably have known, would be relied upon by the promisee, where the promisee has altered his position to his detriment in reliance on the promise; or unless*

(5) *it is a promise to keep a proposal open for a definite period of time or until the occurrence of a specified event; or unless*

(6) *it is a promise to dispense with or remit the performance of a promise or to extend the time for its performance.*"

Section 6. For section 26 of the principal Act, the following section shall be substituted, namely:—

"26. *Agreement in restraint of marriage void in certain cases.*

(i) Every agreement in *total restraint of the marriage of any person, other than a minor, is void.*

(ii) *An agreement in partial restraint of the marriage of any person, other than a minor, is void if the court regards it as unreasonable in the circumstances of the case.*"

Section 27. In section 27 of the principal Act, for the words "is to that extent void" the words "is to that extent void, *except in so far as the restraint is reasonable having regard to the interests of the parties to the agreement and of the public*" shall be substituted.

Section 28. In Exception 1 to section 28 of the principal Act, for the words "only the amount awarded in such arbitration shall be recoverable" the words "*the parties will be bound by the award*" shall be substituted.

Section 30. For section 30 of the principal Act, the following section shall be substiuted, namely:—

"30. *Agreements by way of wager, or collateral thereto, void.*

(1) *The following agreements are void:*—

(a) agreements by way of wager (*hereinafter in this section referred to as "wagering agreements"*);

(b) *agreements knowingly made to further or assist the entering into or carrying out of wagering agreements;*

(c) *agreements by way of security or guarantee for the performance of agreements referred to in clause* (a) *or* (b) *of this sub-section;*

and no suit shall be brought for recovering any sum of money paid or payable in respect of any agreement which is void under this sub-section.

(2) *No suit shall be brought for recovering—*

(a) *any commission, brokerage, fee, or reward in respect of the knowingly entering into, effecting or carrying out, or of the knowingly aiding in effecting or in carrying out, or otherwise claimed or claimable in respect of, any agreement which is void under sub-section* (1), *whether the plaintiff in such suit be or be not a party to such agreement; or*

(b) *any sum of money knowingly paid or payable on account of any person by way of commission, brokerage, fee or reward in respect of such agreement; or*

(c) anything alleged to be won on any wager, or entrusted to any person to abide the result of any game or other uncertain event on which any wager is made.

Exception.—This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or towards any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Explanation.—Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code apply." 45 of 1860.

After section 37 of the principal Act, the following section shall be inserted, namely:— Section 37A. (New)

"37A. *Benefits conferred on third parties.*

(1) *Where a contract expressly confers a benefit directly on a third party, then, unless the contract otherwise provides, it shall be enforceable by the third party in his own name, subject to any defences that would have been valid between the contracting parties.*

(2) *Where a contract expressly conferring a benefit directly upon a third party has been adopted, expressly or impliedly, by the third party, the parties to the contract cannot substitute a new contract for it or rescind or alter it so as to affect the rights of the third party.*"

Section 38. For the last paragraph of section 38 of the principal Act, the following shall be substituted, namely:—

"An offer to one of several joint promisees, *which has not been accepted,* has the same legal consequences as an offer to all of them."

Section 38A. (New) After section 38 of the principal Act, the following section shall be inserted, namely:—

"38A. *Acceptance of performance by one of several joint promisees.*

One of several joint promisees cannot accept an offer of performance, without the concurrence of the others."

Section 44A. (New) After section 44 of the principal Act, the following section shall be inserted, namely:—

"44A. *Effect of decree obtained against one promisor.*

A decree against any one or more of a number of joint promisors does not, if it has remained unsatisfied, and in the absence of express agreement to the contrary, bar a subsequent suit against any one or more of the other promisors."

Section 49. To section 49 of the principal Act, the following Explanation shall be added, namely:—

"*Explanation.—In the case of a contract of loan, where the creditor has not appointed a place for repayment of the loan and the borrower has made no application for such appointment, it is the duty of the borrower to make the repayment at the place where the creditor carries on business, or, if there is no such place, at the place where the creditor resides*".

Section 62 To section 62 of the principal Act, the following Explanation shall be added, namely:—

"*Explanation.—An agreement may be made under this section notwithstanding that there has been*

a breach of the original contract by any party thereto".

For section 65 of the principal Act, the following section shall be substituted, namely:— Section 65.

"65. *Obligation of person who has received advantage under void agreement or contract that becomes void or is avoided.*

Where an agreement *between parties competent to contract* is discovered to be void, or when a contract becomes void *or is avoided by a party entitled to do so*, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it, to the person from whom he has received it.

Explanation 1.—*An agreement which is void by reason of the minority of any party thereto is governed by the provisions of this section, if the agreement is entered into by the minor falsely representing that he is major.*

Explanation 2.—*An agreement which is void by reason of non-compliance with any requirement relating to form or sanction of any authority, prescribed by or under any law, is governed by the provisions of this section".*

After section 67 of the principal Act, the following section shall be inserted, namely:— Section 67A (New).

"67A. *Material alterations in an instrument containing the contract.*

(1) *Any material alteration of any instrument in which a contract is expressed renders the contract void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the parties to the contract.*

(2) *A party to a contract expressed in an instrument, who asserts his rights thereunder, is bound by the instrument, notwithstanding any previous alteration of the instrument known to him.*

(3) *For the purposes of this section, a material alteration is one which varies the rights, liabilities or legal position of the parties as ascertained by the instrument in its original state, or otherwise affects the substance of the contract expressed in the instrument or prejudices any party bound by the contract.*

(4) *An alteration which merely expresses what was already implied in the instrument, or adds particulars which, though superfluous, are consistent with the instrument as it stands, is not a material alteration within the meaning of this section.*

(5) *The provisions of this section shall not apply where the alteration was made by a stranger without the consent of, or any negligence or fraud on the part of, a party to the contract."*

Section 69. In section 69 of the principal Act, for the words "who is interested in the payment of money" the words "who, *though not bound by law to pay,* is interested in the payment of, money" shall be substituted.

Section 69A. (New). After section 69 of the principal Act, the following section shall be inserted, namely:—

"69A. *Contribution between joint tort-feasors.*

(1) *Where damage is suffered by any person as a result of a tort (whether a crime or not), any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage, whether as joint tort-feasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.*

(2) *In any proceedings for contribution under this section, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court*

shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

In section 70 of the principal Act,—

Section 70.

For section 70 of the principal Act, the following section shall be substituted, namely:—

"70. *Obligation of person enjoying benefit of non-gratuitous act.*

Where a person lawfully does anything for another person, or delivers anything *or pays any money to him,* not intending to do so gratuitously, and such other person *accepts and* enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore, the thing so done or delivered *or the money* so paid."

Section 72.

For section 72 of the principal Act, the following section shall be substituted, namely:—

"72. *Liability of person to whom money is paid or thing delivered by mistake or under coercion or as a result of fraud, etc.*

A person to whom money has been paid, or any thing delivered, by mistake *(whether of fact or law)* or under coercion, *or who obtains such payment or delivery by fraud or misrepresentation or by the exercise of undue influence,* must repay or return it.

Explanation.—An act may amount to coercion within the meaning of this section though it does not constitute coercion as defined in section 15".

After section 72 of the principal Act, the following sections shall be inserted, namely:—

Sections 72A—B. (New).

"72A. *When contract of indemnity may be implied.*

When an act is done by one person at the request of another, and the act, not being in itself manifestly tortious to the knowledge of the person doing it, turns out to be injurious to the rights of a third party, then, in the absence of express agreement to the contrary, the person

doing it is entitled to be indemnified by the person at whose request it is done.

72B. *Restitution by person unjustly benefited in cases not expressly provided for.*

In any case not coming within the scope of sections 68 to 72A, where there is no contract, but a person is unjustly benefited at the expense of another person, the former is bound to restore the benefit to the latter or to make compensation therefor."

Section 124. For section 124 of the principal Act, the following section shall be substituted, namely:—

"124. "*Contract of indemnity*" *defined.*

A contract by which one party promises, *expressly or impliedly,* to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person *or by any event not depending on such conduct,* is called a "contract of indemnity."

Section 125A (New). After section 125 of the principal Act, the following section shall be inserted, namely:—

"125A. *Rights of indemnity-holder.*

(1) *The promisee in a contract of indemnity acting within the scope of his authority may, where a liability has arisen against him in favour of a third party, obtain against the promisor, in an appropriate case, a decree compelling the promisor to set apart a fund out of which the promisee may meet such liability or directing the promisor to discharge such liability himself.*

(2) *The promisee may institute a suit under this section even where no such suit as is referred to in section 125 has been instituted, and irrespective of whether any actual loss has been sustained by the promisee or not.*

Explanation.—The promisee is not precluded from obtaining relief under this section merely on the ground that the promisee's liability to the third party cannot be effectively enforced against him".

To section 130 of the principal Act, the following Exception shall be added, namely:— Section 130.

"*Exception.—A continuing guarantee given to a court cannot be revoked by the surety as to future transactions, without the permission of the court.*"

In section 134 of the principal Act, the following Explanation shall be inserted at the end, namely:— Section 134.

"*Explanation.—For the purposes of this section, the following do not amount to acts or omissions the legal consequence of which is discharge of the principal debtor:—*

(i) *mere failure to sue the principal debtor within the time specified by any law relating to limitation for the time being in force;*

(ii) *inability to sue the principal debtor, arising by reason of any provision contained in any of the Orders in the First Schedule to the Code of Civil Procedure,* 1908." 5 of 1908.

For section 141 of the principal Act, the following section shall be substituted, namely:— Section 141.

"141. *Surety's right to benefit of creditor's securities.*

If the debt or liability owed by the principal debtor to the creditor has been paid or discharged in full, the surety is entitled to the benefit of every security which the creditor has against the principal debtor, *whether such security was or was not in existence at the time when the contract of suretyship was entered into, and whether such security was received by the creditor before, contemporaneously with or after the contract of suretyship was entered into,* and whether the surety knows of the existence of such security or not; and if the creditor loses or, without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security."

In section 142 of the principal Act,— Section 142.

(a) a comma shall be inserted after the word "misrepresentation;"

(b) the comma appearing after the word "creditor" shall be omitted.

Section 143. In section 143 of the principal Act, for the words "by means of keeping silence" the words "by *wilful* silence" shall be substituted.

Section 145. To section 145 of the principal Act, the following Explanations shall be added, namely:—

"*Explanation* 1.—*The right of the surety to indemnity under this section shall not be deemed to prejudice his right to recover damages in appropriate cases.*

Explanation 2.—*Payment by a surety of a debt barred as against the principal debtor by limitation, is a payment made "rightfully" within the meaning of this section.*"

Section 149. To section 149 of the principal Act, the following Explanation shall be added, namely:—

"*Explanation.—Delivery of the documents of title to any goods by, or with the consent of, the owner has, for the purposes of this section, the same effect as delivery of the goods*".

Section 151. In section 151 of the principal Act, for the words "the bailee is bound" the words "the bailee is, *in the absence of any special contract*, bound" shall be substituted.

Section 160. Section 160 of the principal Act shall renumbered as sub-section (1) thereof, and to sub-section (1) as so renumbered, the following sub-section shall be added, namely:—

"(2) *In the case of a breach of the said duty, the bailor is entitled to claim damages and, in the case of disposal of the goods by the bailee, the bailor is also entitled to follow the proceeds wherever they can be distinguished.*"

Section 178. (a) Section 178 of the principal Act shall be renumbered as sub-section (2) of that section, and the following sub-section shall be inserted as sub-section (1) of that section, namely:—

"(1) *Where the owner of any goods is in possession of the documents of title to the goods, any*

pledge made by him by delivery of the documents of title shall be as valid as a pledge by him by delivery of the goods."

(b) For the marginal note to section 178 of the principal Act, the following shall be substituted, namely:—

"Pledge *by owner in possession of documents of title,* or by mercantile agent."

In section 181 of the principal Act, after the words "any such suit" the words "*as is referred to in section 180*" shall be inserted. Section 181.

After section 181 of the principal Act, the following section shall be inserted, namely:— Section 181A (New)

"181*A. Constructive bailment.*

Where, otherwise than by a mutual contract of bailment, one person lawfully comes into possession of goods belonging to another and holds them under circumstances whereby he ought, upon principles of justice, to keep them safely and restore them or deliver them to the owner, then such person and the owner have the same mutual rights and liabilities as if they were bailee and bailor respectively under a contract of bailment".

For section 182 of the principal Act, the following section shall be substituted, namely:— Section 182.

"182. *Agent and principal defined.*

An "agent" is a person having express or implied authority to represent or act on behalf of another person, who is called the "principal"."

For section 183 of the principal Act, the following section shall be substituted, namely:— Section 183.

"183. *Capacity to act as principal.*

Capacity of any person to enter into any contract or do any other act by means of an agent is, subject to the provisions of section 187A, co-extensive with his capacity to enter into that contract or do that act himself".

Section 184. For section 184 of the principal Act, the following section shall be substituted, namely:—

"184. *Who may be an agent.*

As between the principal and third persons any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent—

(a) so as to be responsible to his principal, or

(b) *so as to be personally bound to third persons in respect of contracts entered into by him on behalf of his principal,*

according to the provisions in that behalf herein contained".

Section 186. Section 186 of the principal Act shall be omitted.

Section 187. For section 187 of the principal Act, the following section shall be substituted, namely:—

"187. *Definition of express and implied authority.*

An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written or the ordinary course of dealing, *or the relationship in which the parties stand to each other and the necessities of the case,* may be accounted *such* circumstances...."

Section 187A (New). After section 187 of the principal Act, the following section shall be inserted, namely:—

"187A. *Acts which may be done by means of an agent.*

An agent may be appointed for the purpose of entering into any contract or doing any other act on behalf of the principal which the principal might himself enter into or do, not being a contract or other act,—

(a) *which is to be entered into or done for the purpose of exercising a power or authority conferred or performing a duty imposed on the principal personally, the exercise or performance of which requires discretion or skill, or*

(b) *which the principal is by or under any law required to enter into or do himself".*

Section 188.

For section 188 of the principal Act, the following section shall be substituted, namely:—

"188. *Extent of an agent's authority.*

(1) An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act *or ordinarily incidental to doing it in* the usual way.

(2) *An agent has implied authority to act, in the execution of his express authority, according to the custom or usage prevailing in the market, trade or business in which he is employed.*

(3) An agent having an authority to carry on a business has authority to do every lawful thing necessary for the purpose, or usually done in the course of *conducting such business.*"

Section 190.

For section 190 of the principal Act, the following section shall be substituted, namely:—

"190. *Delegation by agent.*

An agent cannot lawfully employ any other person to perform acts which he has expressly or impliedly undertaken to perform, ... *except in the following cases:*—

(i) *where, by the usage of the market, trade or business in which the agent is employed,* a sub-agent may be employed;

(ii) where, from the nature of the agency, a sub-agent must be employed;

(iii) *where the agent has express or implied authority to delegate his powers or duties;*

(iv) *where the act to be done is purely ministerial and does not involve any confidence or discretion or require any skill.*"

Section 194.

In section 194 of the principal Act—

(a) for the word "name" the word "*appoint*" shall be substituted;

(b) for the word "named" the word "*appointed*" shall be substituted.

Section 196. To section 196 of the principal Act, the following Explanation shall be added, namely:—

"*Explanation.—For the purpose of ratification it is immaterial whether the person by whom the act is done is an agent exceeding his authority, or a person having no authority to act for the person ratifying it; but an act which is in its inception void cannot be ratified*".

Section 198. For section 198 of the principal Act, the following section shall be substituted, namely:—

"198. *Knowledge requisite for valid ratification.*

No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective, *except where such person intends to ratify the act and take the risk whatever the facts of the case may be.*

Explanation.—It is not necessary that the person ratifying should have knowledge of the legal effect of the act, or of collateral circumstances affecting the nature thereof".

Section 200A (New). After section 200 of the principal Act, the following section shall be inserted, namely:—

"200A. *Effect of ratification of contract in respect of past breaches.*

The ratification of a contract does not give the person who ratifies it a right of action in respect of any breach thereof committed before its ratification".

Section 201. For section 201 of the principal Act, the following shall be substituted, namely:—

"201. *Termination of agency.*

An agency is terminated—

(a) by the principal revoking his authority;

(b) by the agent renouncing the business of the agency;.....

(c) by the business of the agency being completed;.....

(d) by either the principal or agent dying or becoming of unsound mind;....

(e) by *either* the principal *or agent* being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors;

(f) *by expiry of the period of agency, if any;*

(g) *by the destruction of a material part of the subject-matter of the agency;*

(h) *by the happening of any event which renders the agency unlawful or upon the happening of which it is agreed between the principal and the agent that the authority shall determine; or*

(i) *by dissolution of the principal, where the principal is a firm or a company or other corporation".*

Section 204

In section 204 of the principal Act, for the words "such acts and obligations as arise from acts already done in the agency" the words *"acts already done in the agency and obligations arising from such acts"* shall be substituted.

Section 206.

For section 206 of the principal Act, the following section shall be substituted, namely:—

"206. *Notice of revocation or renunciation where there is no fixed period of agency.*

Where there is no express or implied contract that the agency should be continued for any period of time, resonable notice must be given of any revocation or renunciation *of the agency by the principal or the agent, as the case may be;* otherwise the damage thereby resulting to *the agent or the principal,* as the case may be, must be made good to the one by the other."

Section 211

In section 211 of the principal Act, for the words "according to the directions", the words "according to the *lawful* directions" shall be substituted.

Section 215

In section 215 of the principal Act, the words "if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him" shall be omitted.

Section 216A (New)

After section 216 of the principal Act, the following section shall be inserted, namely:—

"216A. *Agent's liability in respect of bribes etc.*

If an agent, without the knowledge of his principal, accepts or agrees to accept any bribe or secret commission from a third person, then, without prejudice to the provisions of section 218A,—

(a) *the agent is bound to make compensation to his principal in respect of any loss caused to the principal by such act of the agent;*

(b) *the principal may, notwithstanding anything contained in sections* 202, 205 *and* 206, *summarily revoke the authority of the agent".*

Section 218A (New). After section 218 of the principal Act, the following section shall be inserted, namely:—

"218A. *Agent's duty to pay profits not contemplated.*

If an agent, without the knowledge of his principal, makes any profits or acquires any benefit from his agency, other than a profit or benefit contemplated by the principal at the time of making the contract of agency, he is bound to pay the principal all such profits and the value of all such benefits".

Section 220. To section 220 of the principal Act, the following Explanation shall be added, namely:—

"Explanation.—"Misconduct", in this section, includes the following acts of the agent, namely:—

(i) *entering into any transaction which is unlawful on the face of it or by reason of facts known to the agent;*

(ii) *entering into a transaction in violation of the duties arising from the fiduciary character of the relationship between the principal and the agent, even if the transaction is adopted by the principal;*

(iii) *acceptance of, or agreement to accept, a bribe or secret commission from a third person".*

Section 229. *In section* 229 of the principal Act, the words "*except where the agent, being a party to the commission of a fraud on the principal, omits to communicate any such notice or information to the principal*" shall be inserted at the end.

To section 230 of the principal Act, the following paragraph shall be added, namely:— Section 230.

"An agent may personally enforce a contract, if he has a special property in the subject-matter thereof".

After section 230 of the principal Act, the following section shall be inserted, namely:— Section 230A (New).

"230A. *Rights of agent where relation resembling a contractual relation has been created against a third person.*

Where, in any of the circumstances dealt with in sections 68 to 72B, a person becomes entitled to any relief, he may personally claim such relief from a third person, although he was acting as an agent of any other person in the act or transaction which gives rise to such relief".

Section 232 of the principal Act shall be omitted. Section 232.

In section 233 of the principal Act, the following words shall be added at the end, namely:— Section 233.

"but a decree obtained in respect of any liability against a principal or an agent, whether the decree is satisfied or not, is, so long as it subsists, a bar to any proceeding in respect of the same liability against the agent or the principal, as the case may be".

After section 237 of the principal Act, the following section shall be inserted, namely:— Section 237A. (New).

"237A. *Agency by estoppel.*

Where any person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of such representation, to the same extent as if such other person had the authority which he was so represented to have".

After section 238 of the principal Act, the following sections shall be inserted, namely:— Sections 238A and 238B (New).

"238A. *Right of person injured by wrongful act of an agent.*

Where an act or omission of an agent acting within the scope of his authority causes an injury to the rights of a third person, the third person may hold either him or his principal or both of them, liable.

238B. *Right of principal to follow property in the hands of third person.*

(1) *Where any property of the principal is disposed of by an agent in favour of a third person in excess of his authority, then, except as otherwise provided by any other provision of law for the time being in force, the principal has the right to recover the property in the hands of any person.*

(2) *Nothing in this section entitles the principal to any right in respect of property in the hands of—*

(a) *a transferee in good faith for consideration without having notice of the agent's excess of authority, either when the purchase-money was paid, or when the conveyance was executed, or*

(b) *a transferee for consideration from such a transferee.*

Explanation.—A judgment-creditor of the agent attaching and purchasing the principal's property is not a transferee for consideration within the meaning of this sub-section.

(3) *Nothing in this section applies to money, currency notes, and negotiable instruments in the hands of a bona fide holder to whom they have passed in circulation, or shall be deemed to affect the liability of a person to whom a debt or charge is transferred."*

Omission of illustrations.

All illustrations appearing below any section of the principal Act shall be omitted.

Repeal (New).

The Act for Avoiding Wagers Amendment Act, 1865 (*Bombay Act* 3 of 1865) *is hereby repealed.*

APPENDIX II

Suggestions in respect of other acts

Trusts Act, 1882.

Sec. 84.—The section should be amended so as to include the case of payment of money or delivery of property, as suggested [Paragraph 100].

Code of Civil Procedure, 1908.

Order VIII (or some other suitable place).—The advisability of a specific provision relating to the defence open to a defendant in a suit for contribution by a co-promisor, where the defendant was not a party to the creditor's suit, to be considered [Paragraph 70].



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